Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of the laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

PARTIES

Petitioners are John Geddes Lawrence and Tyron Garner. Respondent is the State of Texas.

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In this case, the full power of the criminal law was brought to bear against Petitioners John Lawrence and Tyron Garner, who were arrested, held in custody, convicted, and punished for engaging in consensual sexual intimacy in the privacy of one of their homes. Texas's "Homosexual Conduct" law targets gay and lesbian couples while leaving heterosexual couples free to engage in the very same acts. The Texas statute invades consensual, adult intimacy that is an integral part of forming and nurturing long-term relationships; it pries into the home; and it regulates at the uniquely intrusive level of how chosen partners physically express their affections for one another. Petitioners challenge the Texas statute and their convictions under the rights to equal protection and to privacy and liberty guaranteed by the United States Constitution.

OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' orders refusing discretionary review are unreported. App. 1a, 2a. The decision of the *en banc* Court of Appeals for the Fourteenth District of Texas is reported at 41 S.W.3d 349. App. 4a. The court's prior panel opinion is unreported. App. 80a. The judgments entered by the Harris County Criminal Court are unreported. App. 107a, 109a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2001. App. 3a. On April 17, 2002, the Texas Court of Criminal Appeals denied a timely consolidated petition for discretionary review. App. 1a, 2a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The Homosexual Conduct Law

Texas law criminalizes private consensual adult sexual conduct when engaged in by same-sex couples, but not identical conduct by different-sex couples. The Texas Penal Code defines certain conduct, including oral and anal sex, as "deviate sexual intercourse," *without* regard to whether the actors are of the same or different sexes. *See* Tex. Pen. Code § 21.01(1); *C.M. v. State*, 680 S.W.2d 53, 56 (Tex. App. – Austin 1984, no writ). The Code makes "deviate sexual intercourse" a crime, for all, when it occurs in public. Tex. Pen. Code § 21.07(a)(2). The Code also criminalizes sexual conduct, for all, whenever it is without consent, *id.* § 22.011(a)(1), in exchange for money, *id.* § 43.02, or with a minor, *id.* §§ 22.011(a)(2), 21.11. But in addition to those crimes, the

Texas Penal Code creates a separate offense, called "Homosexual Conduct," that consists simply of engaging in so-called "deviate sexual intercourse" with another person of the same sex. *Id.* § 21.06 (the "Homosexual Conduct Law" or "Section 21.06"). Thus, the Homosexual Conduct Law criminalizes private, adult, consensual sexual conduct for same-sex couples only, but not identical conduct by different-sex couples.[1]

Because it singles out same-sex couples, this law is unlike the typical common law prohibition on "sodomy," and differs fundamentally from the Georgia law considered by the Court in *Bowers v. Hardwick*, 478 U.S. 186, 188 n.1 (1986).[2] The evolution of Texas law illustrates this unusual quality. In 1860, Texas adopted a law prohibiting anal sodomy for all persons. 1860 Tex. Crim. Stat. art. 342. In 1943, the State added a general proscription against oral sex to the statute. 1943 Tex. Sess. Law Serv. ch. 112, § 1 (Vernon). In the early 1970s, however, the general law focusing on these acts was repealed and the present law, narrowed to cover only certain persons, was adopted. 1973 Tex. Gen. Laws ch. 399, § 1.

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[1] The behaviors labeled "deviate sexual intercourse" by Texas are widely practiced by different-sex as well as same-sex couples. *See, e.g.* Edward O. Laumann *et al.*, *The Social Organization of Sexuality* 98-99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex, and 26% of all men and 20% of all women had engaged in anal sex).

[2] When the Fourteenth Amendment was ratified, only three of the 37 States had sodomy laws limited to male-male couples, and none had laws that targeted all same-sex couples but exempted different-sex couples. Most of the other States had sodomy laws that applied generally. Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1082-84 (1998).

As an increasing number of States abandoned sodomy offenses that applied to all, a few in the 1970s and 1980s enacted new statutes that specifically targeted homosexual couples. Most States that adopted such laws, however, have already abandoned them. *See infra* note 26. Today, in addition to Texas, only Kansas has an explicitly same-sex-only sodomy law in full force and effect, Kan. Stat. Ann. § 21-3505(a)(1); Missouri enforces such a statute in part of that State, *see* Mo. Rev. Stat. § 566.090;[3] and Oklahoma's general sodomy statute has been judicially construed to exclude heterosexual consensual behavior, *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986); Okla. Stat. tit. 21, § 886. Nine other States retain criminal laws that bar consensual sodomy for all.[4]

In earlier civil litigation, a Texas intermediate court struck down the State's Homosexual Conduct Law as unconstitutional. *State v. Morales*, 826 S.W.2d 201 (Tex. App.-Austin 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994). The Texas Supreme Court subsequently held, however, that the constitutionality of the law could not be decided in a civil declaratory judgment action. It ruled that constitutional review should occur in the context of a criminal prosecution, with final review in the Texas Court of Criminal Appeals. 869 S.W.2d at 943-47. In the present case, however, the latter court refused

[3] One state court of appeals in Missouri has construed that State's same-sex-only law not to apply to consensual behavior, *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999), but prosecutions still occur elsewhere in the State, *see Six Men Charged Under Rarely Used Homosexual Intercourse Law*, Assoc. Press Newswires, Mar. 30, 2002.

[4] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

to exercise its jurisdiction to review the law, App. 1a, 2a, leaving its uniquely intrusive burdens in effect throughout Texas.

B. Petitioners' Arrests, Convictions, and Appeals

Late in the evening of September 17, 1998, sheriff's officers entered the private home of Petitioner Lawrence while investigating a false report of a "weapons disturbance." App. 129a, 141a; Clerk's Record in *State v. Lawrence*, at 6 ("C.R.L."); Clerk's Record in *State v. Garner*, at 6 ("C.R.G.").[5] There, they intruded on Lawrence and Garner having sex. App. 129a, 141a. The officers arrested Petitioners, and they were not released until a day later. *See* C.R.L. 3; C.R.G. 3.

The State charged Petitioners with violating Section 21.06. The sole facts alleged by the State to make out a violation were that each Petitioner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. 127a, 139a. The State did not allege that the sexual conduct was public, violent or non-consensual, with a minor, or in exchange for money. App. 127a, 129a, 139a, 141a. The charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home. *Id.*

After proceedings and initial convictions in the Justice of the Peace Court, Petitioners appealed for a trial *de novo* to the Harris County Criminal Court. C.R.L. 15; C.R.G. 12. They filed motions to quash the charges on the ground that the law is unconstitutional on its face and as applied to their "consensual, adult, private sexual relations with another person of the same

[5] The person who called in the report later admitted his allegations were false and was convicted of filing a false report. *See* R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, Hous. Chron., Nov. 6, 1998, at 1A.

sex." App. 118a, 131a. Petitioners each contended that the Homosexual Conduct Law violates their "right to equal protection under the Equal Protection Clause of the Fourteenth Amendment," including by discriminating on the basis of sexual orientation. App. 117a, 119a-120a, 130a, 132a-133a. Petitioners also argued that the law violates the federal constitutional rights to privacy and due process, invoking the Bill of Rights generally, and the First, Fourth, Fifth, Ninth and Fourteenth Amendments specifically, and contending that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided. App. 117a, 121a-122a, 130a, 134a-135a.[6]

On December 22, 1998, the court denied the motions to quash. App. 113a. Lawrence and Garner then pled *nolo contendere*. App. 114a. The Court accepted the pleas after the State's recitation of prima facie facts taken only from its complaints, found both men guilty, and imposed on each $200 in fines and $141.25 in court costs. App. 107a-108a, 109a-110a, 116a.

In consolidated appeals to the Texas Court of Appeals, Lawrence and Garner continued all their federal challenges.[7] They argued that Section 21.06 impermissibly classifies between citizens "[u]nder any characterization of the classification." In particular, they urged that the law discriminates on the basis of sexual orientation without a sufficient justification. Amended

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[6] In addition, Lawrence and Garner raised state constitutional privacy and equal protection claims.

[7] Under the Texas Code of Criminal Procedure, a defendant entering a plea of *nolo contendere* has a right to appeal any issue raised in a written motion filed prior to trial. Tex. Code Crim. P. § 44.02; *Morgan v. State*, 688 S.W.2d 504, 507 (Tex. Crim. App. 1985) ("the Legislature surely contemplated a meaningful appeal – one that addresses and decides each issue on its merits").

Brief of Appellants John Geddes Lawrence and Tyron Garner 4, 5, 6-17 ("Am. Br."); Additional Brief of Appellants 1 n.1, 14-22 ("Add'l Br."); Petition for Discretionary Review 7-13 ("Pet. Disc. Rev."). They continued to argue that under the federal Constitution the statute "invades the privacy rights of Mr. Garner and Mr. Lawrence by enabling the government to punish them for engaging in sexual relations in the privacy of Mr. Lawrence's home," and to preserve their contention that *Bowers* was wrongly decided. Am. Br. 5, 23-26; Add'l Br. 23 n.20; Pet. Disc. Rev. 16-19.

At oral argument in the appellate court, the State conceded that there is no compelling government justification for Section 21.06. App. 76a (Anderson, J., dissenting) (state counsel "could not 'even see how he could begin to frame an argument that there was a compelling State interest,' much less demonstrate that interest for [the] Court"). Texas repeatedly has identified its only aims as "enforcement of principles of morality and the promotion of family values." *See, e.g.*, State's Brief in Support of Rehearing En Banc 16.

On June 8, 2000, a panel of the Court of Appeals reversed Petitioners' convictions under the Texas Equal Rights Amendment, holding that Section 21.06 discriminates on the basis of sex. App. 86a-92a. The State moved for rehearing *en banc*, which was granted. On March 15, 2001, the *en banc* Court of Appeals reinstated Petitioners' convictions. App. 3a, 4a. Citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), the court rejected Petitioners' federal privacy claim. App. 24a-31a. As to the federal equal protection claim, the court held that the statute was subject to and survived rational basis review, because it "advances a legitimate state interest, namely, preserving public morals." App. 13a. The court distinguished *Romer v. Evans*, 517 U.S. 620 (1996),

as limited to discrimination in the right to seek legislation. App. 14a-15a.

Two Justices of the appellate court "strongly" dissented from the rejection of Petitioners' federal equal protection arguments. App. 42a. The dissent reasoned that:

> where the same conduct, defined as "deviate sexual intercourse[,]" is criminalized for same sex participants but not for heterosexuals[,] [t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict.

App. 44a.

On April 13, 2001, Petitioners filed their Petition for Discretionary Review with the Texas Court of Criminal Appeals. On April 17, 2002, that court refused review. App. 1a, 2a.

REASONS FOR GRANTING THE WRIT

The Texas Homosexual Conduct Law has made Petitioners Lawrence and Garner convicted criminals based solely on their private sexual activity in Lawrence's home. By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. That discriminatory criminalization tears at gay relationships and stigmatizes loving behavior that others can engage in without the brand of "lawbreaker." The law sends a powerful signal from the State condemning homosexuals. Not surprisingly, then, it is also used to justify discrimination against gay men and lesbians in parenting, employment, access to civil rights laws, and many other aspects of everyday life. This Court

should grant review because the direct and indirect harms imposed by this law and others like it are a glaring affront to the Constitution's guarantee of equal protection.

Much of the reason these laws and harms persist is traceable to the Court's reasoning in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which is in tension with the Court's equal protection jurisprudence, including *Romer v. Evans*, 517 U.S. 620 (1996). Only this Court can step in to make clear that its due process analysis of Georgia's general sodomy statute in *Bowers* does not, despite that decision's focus on "homosexual sodomy," endorse the validity of same-sex-only bans on consensual sexual intimacy under the Equal Protection Clause. As a matter of equal protection, bare condemnation of one group of people – whether termed a moral judgment, a value judgment, or simple dislike – cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny. This equal protection question is separate and independent from the privacy claim also urged here, and confusion in equal protection law independently warrants the Court's intervention.

The time has come, too, for reconsideration of *Bowers*. In the sixteen years since that decision, legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home. That decision should be reversed, for Petitioners as for their gay and non-gay fellow citizens. Since 1986, this Court has employed substantive due process analyses that are less rigidly determined by history and has articulated strong spatial privacy values, particularly in the home. In the same period, more and more States have followed the American tradition that bars government from intruding into couples' consensual sexual and emotional

intimacies in the bedroom, so that now three-fourths of the States have rejected both same-sex-only and general sodomy laws. *Infra* at 24 & note 26. Finally, both law and society now widely recognize the connection between same-sex intimacy and committed relationships, families with children, and households fundamentally like those inhabited by heterosexuals. The Court should take this opportunity to address and protect Petitioners' fundamental rights of privacy and liberty.

I. Whether Equal Protection Permits a State To Impose Wide-Ranging Harms on Gay People by Criminalizing Their Intimate Conduct, While Leaving Others Free To Engage in the Same Conduct, Is a Question of Critical Importance.

There is a compelling need for the Court to take this opportunity to address whether a State may criminalize particular sexual acts only when practiced by same-sex couples. Texas's discriminatory law not only exposes gay couples to prosecution, but also encourages and is used to justify many other forms of inequality against lesbians and gay men. The Homosexual Conduct Law's direct and indirect consequences are contrary to the Constitution's "commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623.

A. The Homosexual Conduct Law and Other Laws Like It Brand Gay People as Second-Class Citizens and Are Used To Justify Further Discrimination.

The law at issue here causes grave harms to those who are prosecuted and to all other gay and lesbian Texans. Lawrence and Garner are now convicted criminals because of who they are, not because of what they were doing in Lawrence's home when the police intruded. Only same-sex couples can run afoul of the Homosexual Conduct Law, which – true to its name – uses

the definition of a gay sexual orientation to trigger illegality. A homosexual is a person who seeks sexual intimacy with a partner of the same sex.[8] The Homosexual Conduct Law flatly forbids lesbians and gay men from engaging in basic forms of sexual expression that are open to and wholly legal for heterosexuals.

Thus, as the Kentucky Supreme Court observed in striking down that State's discriminatory sodomy law, "[s]exual preference, and not the act committed, determines criminality, and is being punished." *Commonwealth v. Wasson*, 842 S.W.2d 487, 502 (Ky. 1992); *see also State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002) (where a law punishes same-sex couples much more harshly than "members of the opposite sex," "the argument that it is not aimed at homosexuals cannot be made with a straight face").[9] *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews").

The "special disability" imposed on lesbians and gay men by the Homosexual Conduct Law has "severe consequence[s]," *Romer*, 517 U.S. at 629, 631. First, based on nothing more than the identity of their chosen partners in private sexual relations,

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[8] *See, e.g.*, John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *Homosexuality: Research Implications for Public Policy* 1 (Gonsiorek & Weinrich eds., 1991) ("*sexual orientation* is erotic and/or affectional disposition to the same and/or opposite sex"); *Webster's Ninth New Collegiate Dictionary* 579, 568 (Merriam-Wesbster Inc. 1991) ("homosexual" is one who "direct[s] sexual desire toward another of the same sex"; "heterosexual" is one who "direct[s] sexual desire toward the opposite sex"). For gay and lesbian people, just as for heterosexuals, adult relationships typically include sexual, emotional, intellectual, and familial aspects. Yet, *sexual* orientation, at its base, focuses on the orientation of one's sexual attraction – to a person of the same or of a different sex.

[9] Petitioners have lodged copies of *Limon* with the Clerk of the Court.

Lawrence and Garner were arrested and held in custody for more than a day – a humiliating invasion of personal dignity. "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief.... And once the period of custody is over, the fact of the arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting).[10]

Petitioners now each have a criminal conviction for private consensual sexuality. This "finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties." *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002).

Moreover, "[t]he Texas courts have held that the crime of homosexual conduct . . . is a crime involving moral turpitude." *In re Longstaff*, 538 F. Supp. 589, 592 (N.D. Tex. 1982) (citation omitted), *aff'd*, 715 F.2d 1439 (5th Cir. 1983). Petitioners' convictions may therefore be used in Texas court proceedings to impeach their character and credibility. *See* Tex. R. Evid. 404(a)(1)(B); Tex. R. Evid. 609(a). The convictions could also enhance a prison sentence if a subsequent federal conviction occurred. *See* U.S. Sentencing Guidelines Manual §§ 4A1.1(c), 4A1.2(c). They disqualify or restrict Lawrence and Garner from practicing dozens of professions in Texas, from physician to

[10] Although Section 21.06 does not authorize imprisonment as a penalty, prison terms can be imposed in the other states with same-sex-only sodomy prohibitions. *See* Okla. Stat. tit. 21, § 886, *amended by* Okla. Sess. Law Serv. ch 460, § 8 (2002) (ten years); Mo. Rev. Stat. §§ 566.090, 558.011 (one year); Kan. Stat. Ann. §§ 21-3505, 21-4502 (six months).

athletic trainer to bus driver.[11] In four states, Lawrence and Garner are considered sex offenders and would have to register with law enforcement as such.[12]

Even apart from direct criminal enforcement, same-sex-only sodomy prohibitions attach a badge of criminality to intimate same-sex relations. *See Jegley v. Picado*, No. 01-815, __ S.W.3d __, 2002 Ark. LEXIS 401, at *30-*31 (Ark. July 5, 2002)[13] (under same-sex-only sodomy laws, gay and lesbian citizens "suffer the brand of criminal impressed upon them by a[n] . . . unconstitutional law").[14] The Homosexual Conduct Law interferes with more than specific sex acts – it strikes at gay relationships in a deeply harmful manner. For gay adults, as for heterosexual ones, sexual expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive. *See, e.g.*, L. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples*, in *Sexuality in Close Relationships* 177-91 (K. McKinney & S. Sprecher eds. 1991);

[11] *See, e.g*, Tex. Occ. Code § 451.251(a) (athletic trainer); *id.* § 164.051(a)(2)(B) (physician); *id.* § 301.409(a)(1)(B) (registered nurse); *id.* § 401.453(a) (speech-language pathologist); *id.* § 1053.252(2) (interior designer); *id.* § 2001.102 (bingo licensee); Tex. Educ. Code § 512.022(f) (school bus driver); Tex. Alco. Bev. Code § 11.46(a)(3) (liquor sales).

[12] *See* Idaho Code §§ 18-8301 to 18-8326; La. Rev. Stat. Ann. §§ 15:540-15:549; Miss. Code Ann. §§ 45-33- 21 to 45-33-57; S.C. Code Ann. §§ 23-3-400 to 23-3-490.

[13] Petitioners note that the LEXIS pagination of the *Jegley* decision is non-final and subject to change at the time this Petition is being filed.

[14] In Texas, calling someone a "homosexual" or using epithets that mean the same is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App.–Houston [14th Dist.] 1980, no writ).

C. Leslie, *Creating Criminals: The Injuries Inflicted By "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 116-20 (2000).

Same-sex sodomy statutes are also widely cited to uphold additional discrimination without reasoned justification. As the State stipulated in an earlier challenge to Section 21.06, it "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03. This law and similar statutes in other states are routinely invoked to limit the custody or visitation that fit, gay parents would otherwise have with their biological children, without any showing of indiscretion or that the child's best interests are jeopardized. *See, e.g., Jegley*, 2002 Ark. LEXIS 401, at *29 (citing case in which analogous Arkansas law was held relevant factor in denying custody to gay parent).[15] Furthermore, these laws are used to block the adoption of civil rights ordinances that would prohibit sexual orientation discrimination.[16]

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[15] *See also* Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, Hous. Chron., June 27, 1994, at A11 (reporting that common tactic of vilifying gay parents in custody battle is "give[n] . . . teeth by § 21.06"); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (restricting gay father's visitation rights, in part because a "statute of this state declares that deviate sexual intercourse with another person of the same sex is illegal. § 566.090.1"). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws In Civil Litigation*, 79 Tex. L. Rev. 813 (2001).

[16] *See, e.g.*, Dianna Hunt, *Plan to Ban Anti-Gay Bias In Fort Worth Dies* Dallas Morning News, Jan. 20, 1999, at 32A (local anti-discrimination measure in Texas abandoned after several members of town council expressed desire to wait until status of state's sodomy law has been resolved); *see also* Arthur S. Leonard, Gay/Lesbian Law Notes (Summer 1998) (Kansas sodomy law cited in support of halting Topeka Human Rights Commission from investigating anti-gay discrimination).

To be sure, discrimination against gay and lesbian Americans is also frequently justified by reference to *general* sodomy laws that are *not* limited to same-sex couples. The Court's decision in *Bowers* – unchecked by any equal protection ruling involving sodomy statutes – contributes to this broad harm. *Bowers* described the case before it as being about "homosexual sodomy," *e.g.*, 478 U.S. at 190, even though the Georgia law at issue, and nearly every other sodomy law cited in *Bowers*, applied to specific acts by any and all couples, *see id.* at 200 (Blackmun, J., dissenting). As a result, consensual sodomy laws that, by their terms, apply to all are used uniquely to harm gay men and lesbians in the same range of ways as same-sex-only sodomy statutes. The laws are often cited as a basis for denying gay parents custody of or restricting their visitation with their own children.[17] Courts also have cited general sodomy laws as a ground for denying public employment to gay people, *see, e.g., Shahar v. Bowers*, 114 F.3d 1105, 1104 & n.17 (11th Cir. 1997), and to uphold public employment questionnaires that ask about homosexual conduct, *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (upholding question about homosexual relations "because the *Bowers* decision is controlling," even though "relevance of this type of question to Wall's employment is uncertain"). In the

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[17] *See, e.g., Weigand v. Houghton*, 730 So. 2d 581, 591 (Miss. 1999) (even though sodomy was not unlawful in State where gay father seeking custody lived, "[t]he element of morality must be resolved against [father] because of his homosexual activity which, if committed within this state would constitute felonious conduct"); *Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (affirming imposition of severe visitation restrictions on lesbian mother, reasoning, "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from lesbian mother and giving custody to child's grandmother, concluding, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody").

political sphere, general sodomy laws have been invoked to block protection of gay citizens by state hate-crime legislation.[18] *See generally* Nan D. Hunter, *Life After* Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 542 (1992) (today "sodomy" has become "code word for homosexuality, regardless of statutory definition").

The real, significant, and ongoing harms suffered by Lawrence, Garner, and thousands of others under the Homosexual Conduct Law and similar statutes make this case one of substantial importance. In Texas and other States with a same-sex-only crime, a federal remedy is especially necessary because those States' own high courts – like the Court of Criminal Appeals here – have refused even to consider constitutional challenges to the laws. *See, e.g., City of Topeka v. Movsovitz*, 960 P.2d 267 (Kan. 1998) (table), *denying review of* No. 77,372 (Kan. Ct. App. April 24, 1998) (rejecting constitutional challenge to same-sex-only sodomy law).[19]

[18] An amendment to include "sexual orientation" in the Utah hate crime bill was defeated after a representative referred to Utah's sodomy law, stating that the "effect of granting special protection under [the hate crime act] to homosexuals would be contradictory under Utah law." *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 222. Similarly, a hate crime bill in North Carolina covering sexual orientation was rejected in 2000 after the House heard testimony about the illegality of sodomy. People for the American Way Foundation, *Hostile Climate: Report on Anti-Gay Activity* 257 (2000).

[19] Petitioners have lodged copies of the Kansas intermediate appellate court's decision in *Movsovitz* with the Clerk of the Court.

B. Under Basic Equal Protection Principles, Bare Disapproval of a Group of People, Whether Couched as "Morality" or Otherwise, Cannot Justify Discriminatory Laws.

The reasoning of the decision below conflicts with core equal protection principles that this Court has recognized in many cases. *See, e.g., Romer v. Evans*, 517 U.S. 620; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). The Texas court reached the wrong result by incorrectly limiting *Romer* to contexts involving "the right to seek legislative protection from discriminatory practices," App. 15a, despite *Romer's* use of the established rational basis test applicable to any legal classification. The Texas court further erred by reading *Bowers* – which expressly declined to address equal protection issues, 478 U.S. at 196 n.8, notwithstanding its references to "homosexual sodomy" – to support the State's "morality" justification for this discriminatory statute. Those errors are not isolated ones. They are spawned by ongoing confusion suggesting that *Bowers* might trump *Romer* in equal protection challenges to laws that discriminate against gay people.[20] The Court should grant *certiorari* both to make clear

[20] For example, the Kansas courts have upheld a criminal law scheme under which a male defendant was sentenced to imprisonment for more than 17 *years* for sexual conduct involving another male, even though the State's laws impose a maximum penalty (including applicable sentencing enhancements) of only 15 *months* for identical conduct if the other person had been female. *Limon*, slip. op at 5-6. (Copies of the *Limon* opinion have been lodged with the Clerk of the Court). Rejecting the defendant's equal protection challenge, the state court construed *Romer* narrowly, *id.* at 13, and upheld the sentencing disparity based on *Bowers*:

> The impact of *Bowers* on our case is obvious. The United States Supreme Court did not recognize homosexual behavior to be in a protected class requiring strict scrutiny

that *Bowers* does not legitimize laws targeting gay Americans for disfavored treatment and to reaffirm that class-based laws require justification beyond the majority's desire to make one group unequal.

Every instance of legislative line-drawing must at least satisfy the "conventional inquiry" of rational basis review. *Romer*, 517 U.S. at 632. This is true no matter how the classification is framed. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633. The only government interest offered by Texas here is a desire to "require adherence to certain widely accepted moral standards" or "family values." State's Appellate Brief 8 ("St. App. Br."). The disparity in treatment serves to condemn same-sex couples based on the majority's disapproval of them, yet leaves different-sex couples – the majority – free to engage in the very same conduct without censure.

This is no independent justification at all. It is just a statement that the legislature wants the criminal law to include this condemnation. If such a rationale, accepted by the court below,

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> of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently . . . .

Id. at 12; *see also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 295, 300 (6th Cir. 1997) ("the salient operative factors which motivated the *Romer* analysis and result were unique to that case"; discrimination against gays and lesbians can be justified as "the expression of community moral disapproval of homosexuality"); *Shahar*, 114 F.3d at 1109-10 & n.25. *But see Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996) ("Of course, *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in *Romer v. Evans*").

were sufficient, any discriminatory law could be justified with the statement that the legislature considered it "moral" to disadvantage the targeted group.

As the Court took pains to emphasize in *Romer*, "'[i]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534); *see also id.* at 635 (a State cannot classify "to make [one group of people] unequal to everyone else"); *Cleburne*, 473 U.S. at 448 ("mere negative attitudes . . . unsubstantiated by factors which are properly cognizable [by government], are not permissible bases" for discriminatory legal rules). Whether termed a moral judgment, a value judgment, a negative attitude, or bias, the majority's bare dislike of one group for engaging in consensual intimate behavior common to all kinds of adult couples cannot suffice to support the government's enactment of that kind of discriminatory standard into law. Texas's "reasoning" here is nothing more than a preference for one group of people and animus toward another.

Further, the line drawn in Section 21.06 is irrational and arbitrary. As supreme courts in other States have explained, "the discouragement of what has historically been perceived to constitute immoral behavior," St. App. Br. 8, cannot legitimize imposition of traditional morality only on a minority:

> "[T]he practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized. . . . The issue here is *not* whether sexual activity traditionally viewed as

> immoral can be punished by society, but whether it can be punished *solely on the basis of sexual preference*."

Jegley, 2002 Ark. LEXIS 401, at *55-*56 (emphasis added) (quoting *Wasson*, 842 S.W.2d at 499).

In striking down same-sex-only consensual sodomy laws, state courts have used state constitutional guarantees of equal protection that incorporate the same rational basis standards applied under the Fourteenth Amendment. *See, e.g., id.* at *52-*55 (relying on *Romer*, *Moreno*, and *Cleburne*, as well as Arkansas precedents). Those state high courts – unlike the court below – found no legitimate or rational basis for such laws. As explained by the Kentucky Supreme Court:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform.... We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

Wasson, 848 S.W.2d at 501; *see also Gryczan v. State*, 942 P.2d 113, 127 (Mont. 1997) (Turnage, C.J., concurring in result by applying equal protection guarantees of both Montana and federal constitutions).

The Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose

on you and me." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *accord Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring). Yet, Texas now imposes the extremely intrusive burdens of traditional sexual mores only on same-sex couples, while exempting the heterosexual majority from traditional moral injunctions against the very same acts by them. This the State may not do.[21]

The State's inability to put forth even a rational and legitimate basis is fatal under any level of scrutiny. In addition, the Homosexual Conduct Law should be subjected to a more rigorous test than rational basis review. Gay Americans have historically been the targets of substantial and harmful discrimination by both government and private actors. *See generally* William B. Rubenstein, *Sexual Orientation And The Law* (2d ed.1997). This history and its present manifestations include brutal hate-motivated crimes against gay men and lesbians merely because of their sexual orientation, creating a climate of fear and silence even among many who are not victims. *See* Enhancement Act of 2001, S. Rep. No. 107-147, at 6 (2002). Gay men and lesbians are targeted and grouped together by a characteristic that "bears no relation to [their] ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion). Moreover, this group's political power has been limited by its size and by discriminatory sentiment in the halls of government, as elsewhere. Some States have responded with anti-

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[21] This is not to say that morality never has a place in informing and justifying legislative enactments. Equal protection limits arise, however, when morality is discriminatory and not even-handed, and when no other legitimate state concern – solely a negative value judgment by the majority – stands behind a law.

discrimination laws, and various hate-crime statutes have also been passed, to ensure that gay citizens, too, receive the equal protection of the laws. But state-sponsored discrimination is far from eradicated, as demonstrated both by the law at issue here and by Colorado's Amendment 2 struck down in *Romer*, to name just two examples. Given this history of discrimination, laws like the Homosexual Conduct Law should be scrutinized with greater skepticism than applies under the rational basis test. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996) (heightened scrutiny appropriate given history of discrimination); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).[22]

II. The Court Should Reconsider *Bowers* and the Critically Important Question Whether Criminalization of Consensual Adult Sexual Intimacy Violates the Rights of Privacy and Due Process.

This case also presents the crucial question whether Texas goes too far by subjecting individuals to criminal penalties for private, adult sexual intimacy. Section 21.06 invades a uniquely intimate realm of personal autonomy, family, and relationships. *See Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 849-51 (1992). Texas here tramples on entrenched expectations of privacy that are central to personal dignity and are deeply valued and broadly shared – even by those who disapprove of the conduct

[22] In addition, the Homosexual Conduct Law uses a *sex*-based classification to accomplish its discrimination against same-sex couples, as the original panel decision in the court below recognized. App. 86a-92a. Petitioner Lawrence would not be guilty of a criminal offense if Petitioner Garner were a woman rather than a man (and vice versa). Laws that use gender to perpetuate traditional social roles are extraordinarily suspect and may stand only if supported by a "highly persuasive justification." *United States v. Virginia*, 518 U.S. at 531. Even more fundamentally, laws that make criminality turn on gender are repugnant. *Cf. McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

outlawed by the statute. The Court should grant *certiorari* to consider anew whether invasive and arbitrary laws of this sort impinge upon liberty and privacy, in violation of due process.

Bowers, of course, addressed parallel issues in the context of a gay man's declaratory judgment challenge to the Georgia sodomy law, which applied to all persons.[23] But much has changed since *Bowers*. *Cf. Atkins v. Virginia*, 122 S. Ct. 2242, 2243 (2002) ("Much has changed since [*Penry*]").[24] The doctrine of *stare decisis* – never an "inexorable command" and even less so in constitutional cases – should not operate to insulate *Bowers* from reconsideration. *Casey*, 505 U.S. at 854; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). This Court's supremacy means that no other tribunal has the power to reconsider *Bowers*, a case "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of th[e] decision[]," 501 U.S. at 828-29.

Bowers does not have any of the unique qualities of cases like *Miranda v. Arizona*, 384 U.S. 436 (1966), that have become imbedded in our "national culture." *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).[25] To the contrary, *Bowers* is out of

[23] *See Bowers*, 478 U.S. at 188 n.1. *But cf. id.* at 198 (Powell, J., concurring) (emphasizing understanding of Georgia sodomy law as "moribund" and that "respondent has not been tried, much less convicted and sentenced").

[24] *Atkins* involved the Eighth Amendment, which incorporates evolving standards of decency. Though defined using other standards, fundamental privacy rights are likewise not static. *See infra* at 26-27. The great change described below indicates the minimal weight that *stare decisis* concerns have here.

[25] Nor are there present here any economic or other reliance interests, nor any issues of statutory interpretation, that have led the Court to determine in other contexts that it is more important that the law "be settled than that it be settled right." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)

step with the vast majority of the States. At the time of Bowers, 24 States plus the District of Columbia still had sodomy laws. 478 U.S. at 194. Since Bowers, half of those jurisdictions have repealed their sodomy laws legislatively or invalidated them as contrary to the respective State's constitution, so that today 37 States plus the District of Columbia no longer criminalize adult, consensual sodomy.[2] "The unmistakable trend . . . nationally . . . is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." Ivgiy, 2002 Ark. LEXIS 401, at *66-*67 (Brown, J., concurring). But 13 States, including Texas, still have such laws, necessitating review by this Court. See supra at 4 & note 4.

The "consistency of the direction of change," Atkins, 122 S. Ct. at 2243, among the States is indicative of a strong national consensus reflecting profound judgments about the limits of government's intrusive powers in a civilized society. To Americans, nothing is more personal and private than sexual

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(quotation marks and citation omitted).

[2] Repeal or invalidation of same-sex-only sodomy laws since Bowers: 1993 Nev. Stat. 236 (repealing Nev. Rev. Stat. § 201.193); Ivgiy, 2002 Ark. LEXIS 401 (Arkansas); Wasson, 842 S.W.2d 487 (Kentucky); Gryczan, 942 P.2d 112 (Montana); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996), appeal denied (Tenn. June 10, 1996 and Sept. 9, 1996).

Repeal or invalidation of general sodomy laws since Bowers: 2001 Ariz. Legis. Serv. 382 (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); Powell v. State, 510 S.E.2d 18 (Ga. 1998); Williams v. Glendening, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); Michigan Org. for Hum. Rights v. Kelly, No. 88-818820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); Doe v. Ventura, No. MC 01-489, 2001 WL 543734 (Minn. 4th Dist. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

relations between consenting adults behind closed doors. As this case demonstrates, sodomy laws permit gross invasions of privacy and impose public humiliations that are an affront to personal dignity. Enforcement of such laws involves police tactics – including inspections of the specific physical details of sexual conduct to verify criminal violations – that are repugnant to any system of ordered liberty. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

As Arizona Governor Jane Hull said in signing the bill repealing Arizona's sodomy law: "At the end of the day I returned to one of my most basic beliefs about government: It does not belong in our private lives." Howard Fischer, Hull OKs Repeal of 'Archaic' Sex Laws Unenforced Ban on Sodomy, Ariz. Daily Star, May 9, 2001, at A1. Similarly, when the Georgia Supreme Court struck down, under the state constitution, the very law upheld by this Court in Bowers, it stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." Powell v. State, 510 S.E.2d 18, 24 (Ga. 1998); see also Gryczan, 942 P.2d at 122 ("[A]ll adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation").[3]

These decisions reflect expectations of liberty and privacy that are foundational to the relationship between government and free citizens. See Bowers, 478 U.S. at 217 (Stevens, J.,

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[3] See also Powell, 510 S.E.2d at 22 (right of privacy is "ancient law," derived from "the Roman's conception of justice" and natural law) (quotation marks omitted); Gryczan, 942 P.2d at 121-22 (right of privacy is "essential to the well-being of a free society"); Campbell, 926 S.W.2d 250, 261-62 & nn.9, 10, 11 (tracing historical foundation of sanctity of home and right of privacy).

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dissenting). Indeed, while Bowers pointed to state laws as evidence that proscriptions of sodomy comport with our Nation's traditions, *see id.* at 192-94, subsequent authoritative rulings from state courts have established the contrary principle: such laws violate ancient and fundamental rights guaranteed by the States to their citizens. *See, e.g.*, Powell, 510 S.E.2d at 22; Gryczan, 942 P.2d at 125-26; Wasson, 842 S.W.2d at 494-95; Campbell v. Sundquist, 926 S.W.2d 250, 261-62 (Tenn. App. 1996), *appeal denied* (Tenn. June 10, 1996 and Sept. 9, 1996).

Bowers has been criticized for characterizing the right at issue *in narrow, group-based terms, i.e.*, "whether the Federal Constitution confers a fundamental right upon homosexuals to engage *in sodomy*," 478 U.S. at 190. *See, e.g.*, Jed Rubenfeld, The Right of Privacy, 102 Harv. L.R. 737, 742-49 (1989). The Court's unusual approach was widely interpreted as sanctioning discrimination against gay and lesbian people. Romer, 517 U.S. at 641 (Scalia, J., dissenting) ("As the [D.C. Circuit] has aptly put it [*in* Padula v. Webster, 822 F.2d 97, 103 (1987)]: 'If the Court [*in* Bowers] was *unwilling* to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious'"). The Bowers methodology has inexorably led to "erroneous decisions as a consequence," Casey, 505 U.S. at 858, counseling reconsideration.

Since Bowers, of course, the Court's substantive due process cases have continued to consider relevant history and tradition *in determining the existence of a fundamental right*, e.g., Glucksberg, 521 U.S. at 720-23, but the Court has not confined its view of the liberties substantively guarded by the Due Process Clause to historical practices examined at the most specific level. Casey, 505 U.S. at 848-50 (*opinion of Court*); County of Sacramento

v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., joined by O'Connor, J., concurring) ("history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry"); Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., joined by Kennedy, J., concurring *in part*).

Also since Bowers, the Court has more forcefully recognized the constitutional dimension of privacy *in the home* and comparable settings. "In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Kyllo v. United States, 533 U.S. 27, 37 (2001) (emphasis *in original*); Minnesota v. Olson, 495 U.S. 91, 98 (1990) (overnight guest receives protection under "everyday expectations of privacy that we all share"). Consensus expectations about the limits of government intrusion into private, adult sexual intimacies, especially in the home, provide the kind of "objective considerations," Lewis, 523 U.S. at 858 (Kennedy, J., joined by O'Connor, J., concurring), that undergird a principled approach to the Due Process Clause. See also Stanley v. Georgia, 394 U.S. 557 (1969); Griswold, 381 U.S. at 484.

Moreover, Bowers has been undermined by Romer. The holding *in* Bowers that the "the presumed belief of a majority of the electorate *in* Georgia that homosexual sodomy is immoral and unacceptable" sufficed to sustain the Georgia law, 478 U.S. at 196 (emphasis added), is in tension with Romer's holding that gay men and lesbians may not be arbitrarily singled out for disfavored legal status, Romer, 517 U.S. at 633; see also id. at 641 (Scalia, J., dissenting). This inconsistency should be resolved by the Court. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law").

The underpinnings of *Bowers* have been substantially eroded in yet another crucial way. *Bowers* rested in large part on the notion that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." 478 U.S. at 191. Since 1986, however, the country has developed a more accurate understanding of gay and lesbian couples and families – neighbors, friends, relatives, and coworkers who live their lives more openly. Even using methods expected to undercount the relevant population, for example, the 2000 United States Census measured more than 600,000 households of unmarried same-sex partners nationally, including almost 43,000 in Texas, the third highest state total. David M. Smith and Gary J. Gates, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households at 1-2 and Table 1 (August 21, 2001), available at http://www.hrc.org/familynet/documents/LGcensus.pdf. These families live in 99.3% of American counties. Id. at 2, Table 4.

Many State and local governments and thousands of employers have enacted domestic partner or more extensive protections for unmarried couples. See Employers That Offer Domestic Partner Benefits, available at http://www.hrc.org/worknet/dp/index.asp. These efforts bear witness to American society's deepened familiarity with and respect for these committed relationships. See also Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (June 24, 2002) (named after gay New York firefighter chaplain who lost his life in September 11 terrorist attacks, law allows federal death benefits to surviving same-sex partners); Alia Ibrahim, District Registers Domestic Partners: Congress Blocked Law for 10 Years, Wash. Post, July 9, 2002, at B1. Every State (except Florida) permits gay men and lesbians to

adopt children individually, jointly and/or through "second-parent adoptions" that are analogous to stepparent adoptions. See, e.g., American Academy of Pediatrics, Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 339 (Feb. 2002). Many thousands of gay and lesbian partners are protected as the joint legal or de facto parents of children they are raising together, and many gay people provide foster homes to needy children.

These changes are part of a broader current recognized by the Court after *Bowers*: "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000); id. at 85 (*Stevens, J., dissenting*); id. at 98-101 (*Kennedy, J., dissenting*); see also *Michael H.*, 491 U.S. at 124 n.3 (plurality) ("The family unit accorded traditional respect in our society . . . includes the household of unmarried parents and their children").

For adults in gay and lesbian families, as in all families, sexual intimacy is a basic component of stable, healthy relationships.[a] The Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life." *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545-46

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[a] Persons not in committed relationships have the same fundamental rights as those who are. "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . ." *Casey*, 505 U.S. at 898; see also id. at 896 (extolling "the right of the individual, married or single, to be free from unwarranted intrusion into matters so fundamentally affecting a person") (quotation marks omitted).

(1987) (internal quotation marks omitted). Of course, this case does not present questions concerning formal recognition or affirmative support of gay and lesbian couples and their children. The question here is whether States may criminally punish private, consensual, sexual conduct.

The idea that a State may enter into American bedrooms and closely inspect the most intimate and private physical interactions, or give its police officers unbridled discretion to arrest disfavored minorities for engaging in consensual sexual activity, is a stark affront to fundamental liberty that the Court should end. Much has changed since Bowers, but both same-sex and broader sodomy laws persist – and have resisted full eradication. Bowers itself has been used to perpetuate and even expand inequities for gay and lesbian people. These consequences of Bowers are not what stare decisis exists to defend, but rather explain the need for the Court's intervention.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

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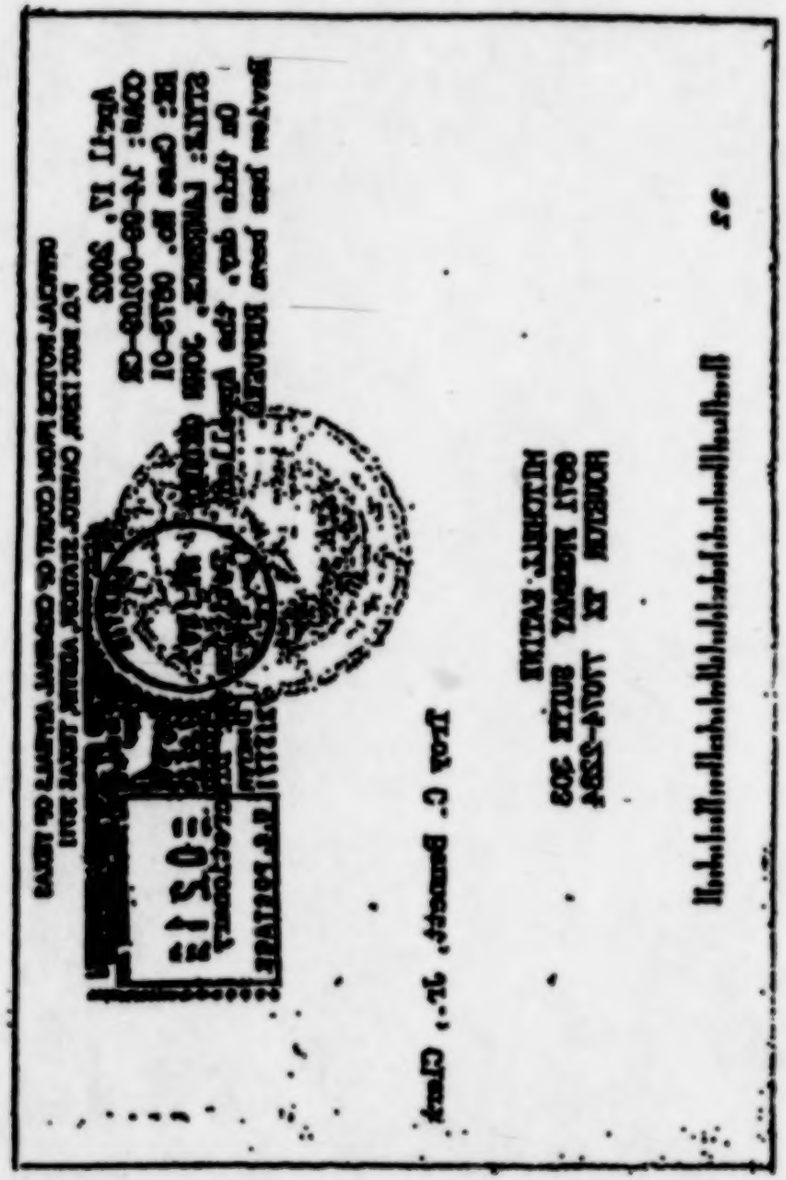
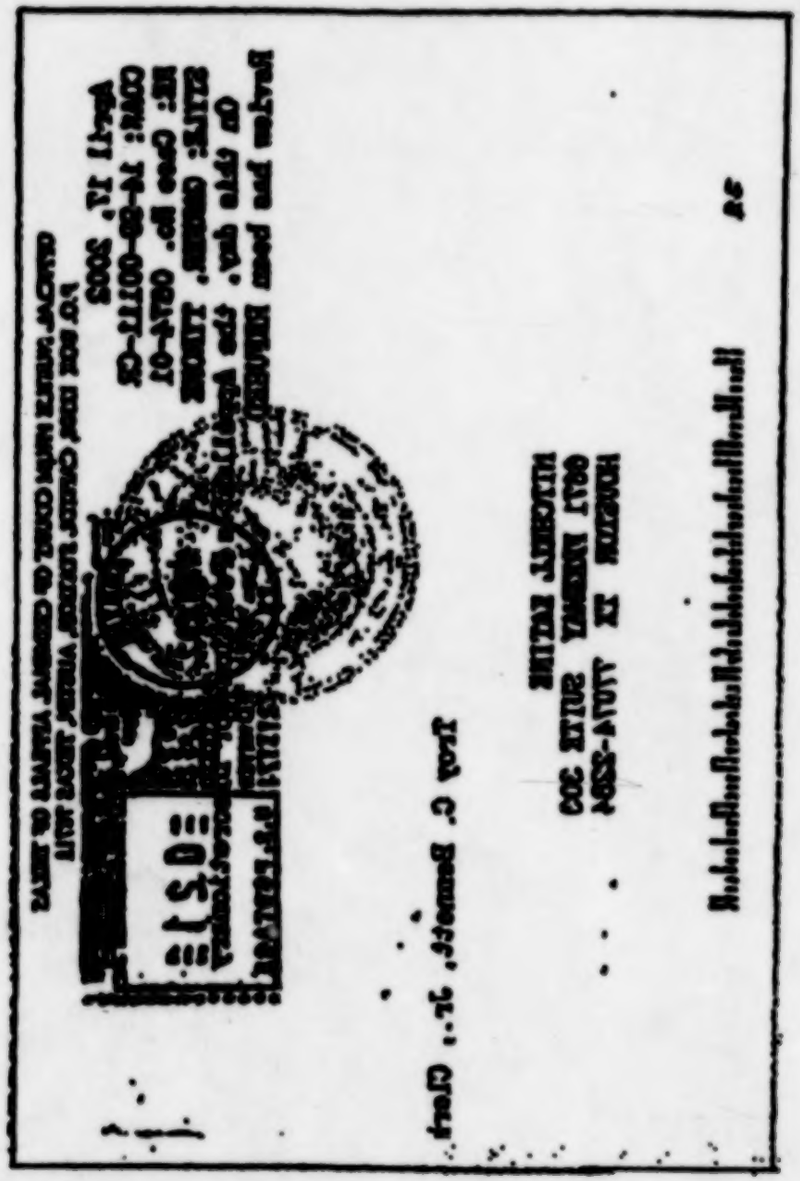
Dated: July 16, 2002

APPENDICES

Appendix A





Appendix C

[41 S.W.3d 349]

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NOS. 14-99-00109-CR & 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 & 98-48531

MAJORITY OPINION

[41 S.W.3d at 350]

Appellants, John Geddes Lawrence and Tyron Garner, were convicted of engaging in homosexual conduct. They were each assessed a fine of two hundred dollars. On appeal, appellants challenge the constitutionality of Section 21.06 of the Texas Penal Code, contending it offends the equal protection and privacy guarantees assured by both the state and federal constitutions. For the reasons set forth below, we find no constitutional infringement.

While investigating a reported "weapons disturbance," police entered a residence where they observed appellants engaged in deviate sexual intercourse.[1] It is a Class C misdemeanor in the State of Texas for a person to engage "in deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). However, because appellants subsequently entered pleas of *nolo contendere*, the facts and circumstances of the offense are not in the record. Accordingly, appellants did not challenge at trial, and do not contest on appeal, the propriety of the police conduct leading to their discovery and arrest. Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional.

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[1] "Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).

EQUAL PROTECTION

In their first point of error, appellants contend Section 21.06 violates federal and state equal protection guarantees by discriminating both in regard to sexual orientation and gender.[2]

[41 S.W.3d at 351]

The universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our whole system of law is predicated on this fundamental principle. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Nevertheless, our federal constitution did not originally contain an express guarantee of equal protection. While an assurance of equal protection could be implied from the Due Process Clause of the Fifth Amendment, this rudimentary guarantee was complicated by constitutional distinctions between "free"

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[2]Appellants rely upon the Fourteenth Amendment of the United States Constitution and two provisions of the Texas Constitution, namely, Article I, sections 3 and 3a:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.

TEX. CONST. art. I, § 3.

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

TEX. CONST. art. I, § 3a.

persons and persons "held to service or labour." U.S. CONST. arts. I, § 2 & IV, § 2.[3]

Although the constitution did not establish or legalize slavery, it certainly recognized its existence within the states which tolerated it. *See The Amistad*, 40 U.S. 518, 551 (1841). This constitutional recognition of slavery undoubtedly facilitated a union of the original colonies, but it postponed until a later day a resolution of the tension between involuntary servitude and the concept of equal protection of laws implied by the Fifth Amendment.[4] Reconciling the institution of slavery with the notion of equal protection ultimately proved to be impossible. In the end, a constitutional "clarification" was obtained by the force of arms, six hundred thousand lives, and two constitutional amendments.

In 1863, while the outcome of the Civil War remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after general hostilities had ended, the Thirteenth Amendment was adopted. It declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The abolition of slavery, however, was not immediately effective in bestowing the equal protection of law upon all persons. Several centuries

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[3] These articles were subsequently amended by the Thirteenth and Fourteenth Amendments.

[4] The Due Process Clause of the Fifth Amendment "requires that every man shall have the protection of his day in court, and the benefit of the general law . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." U.S. CONST. amend. V.

of slavery had instilled a deep cultural bias against people of color. Individual southern states began enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *City of Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring). In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *General Bldgs. Contrs. Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws.

Thus, the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). While the guarantees of "equal protection" and "due process **[41 S.W. 3d at 352]** of law" may overlap, the spheres of protection they offer are not coterminous. *Truax*, 257 U.S. at 332, 42 S.Ct. at 129. Rather, the right to "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.'" *Bolling*, 347 U.S. 497, 499 (1954). It is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. *See Truax*, 257 U.S. at 332-33, 42 S.Ct. at 129. It was not intended, however, "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

Similarly, Article I, § 3 of the Texas Constitution also guarantees equality of rights to all persons. *Burroughs v. Lyles*, 181 S.W.2d 570, 574 (Tex. 1944). It was designed to prevent any person, or class of persons, from being singled out as a

special subject for discriminating or hostile legislation. *Id.* Because the state and federal equal protection guarantees share a common aim and are similar in scope, Texas cases have frequently followed federal precedent when analyzing the scope and effect of Article I, § 3. *Hogan v. Hallman*, 889 S.W.2d 332, 338 (Tex. App.—Houston [14 th Dist.] 1994, writ denied).

The Texas Equal Rights Amendment, however, has no federal equivalent. *See* TEX. CONST. art. I, § 3a. When Texas voters adopted it in 1972 by a four to one margin, both the United States and Texas constitutions already provided due process and equal protection guarantees. *In the Interest of McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Thus, unless the amendment was an exercise in futility, it must have been intended to be more extensive and provide greater specific protection than either the United States or Texas due process and equal protection guarantees. *Id.*

All of the aforementioned state and federal guarantees of equal protection are tempered somewhat by the practical reality that the mere act of governing often requires discrimination between groups and classes of individuals. *Casarez v. State*, 913 S.W.2d 468, 493 (Tex. Crim. App. 1994). A state simply cannot function without classifying its citizens for various purposes and treating some differently than others. *See Sullivan v. U.I.L.*, 616 S.W.2d 170, 172 (Tex. 1981). For example, able-bodied citizens may be required to serve in the armed forces, while the infirm are not. *Casarez*, 913 S.W.2d at 493.

The conflict between the hypothetical ideal of equal protection and the practical necessity of governmental classifications has spawned a series of judicial tests for determining when classifications are and are not permissible. The general rule is that legislation is presumed to be valid and

will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The general rule gives way, however, when a statute classifies persons by race, alienage, or national origin. *Id.* These factors are so seldom relevant to the achievement of any legitimate state interest that laws separating persons according to these "suspect classifications" are subject to strict scrutiny. *Id.* Accordingly, laws directed against a "suspect class," or which infringe upon a "fundamental right," will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.*; *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988).

[41 S.W. 3d at 353]

Sexual Orientation

Relying on the Fourteenth Amendment of the United States Constitution, Article I, § 3 of the Texas Constitution, and the Texas Equal Rights Amendment, appellants contend that Section 21.06 of the Texas Penal Code unconstitutionally discriminates against homosexuals.[5] In other words, the statute improperly punishes persons on the basis of their sexual orientation.

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[5] There is some authority recognizing a distinction between homosexual orientation and homosexual conduct. *Meinhold v. United States Dept. of Defense*, 34 F.3d 1469, 1477 (9 th Cir. 1994); *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9 th Cir. 1991); *see also Watkins v. United States Army*, 875 F.2d 699, 725 (9 th Cir. 1989) (Norris, J., concurring) (stating that "any attempt to criminalize the status of an individual's sexual orientation would present grave constitutional problems").

The threshold issue we must decide is whether Section 21.06 distinguishes persons by sexual orientation. On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual "orientation." Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct.[6] Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation.

However, a facially neutral statute may support an equal protection claim where it is motivated by discriminatory animus and its application results in a discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1997). Appellants contend this discriminatory intent is evident in the evolution of Section 21.06. For most of its history, Texas has deemed deviate sexual intercourse, i.e., sodomy, to be unlawful whether performed by

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[6] In his study of human sexuality, Dr. Alfred C. Kinsey classified the "sexual orientation" of his subjects on a seven point continuum: (1) exclusively heterosexual; (2) predominantly heterosexual, only incidentally homosexual; (3) heterosexual, but more than incidentally homosexual; (4) equally heterosexual and homosexual; (5) predominantly homosexual, but more than incidentally heterosexual; (6) predominantly homosexual, but incidentally heterosexual; and (7) exclusively homosexual. Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 58 (1991). Kinsey estimated that approximately 50 per cent of the population is exclusively heterosexual; 4 per cent is exclusively homosexual. *Id.* at 64. *See also* Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 83-84 (1997); Odeana R. Neal, *The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 705 (1996).

persons of the same or different sex.[7] In 1973, however, the Legislature repealed its prohibition of sodomy generally, except when performed by persons of the same sex. Because "homosexual sodomy" is unlawful, while "heterosexual sodomy" is not, appellants contend the statute evidences a hostility toward homosexuals, not shared by heterosexuals.

While we find this distinction may be sufficient to support an equal protection claim, neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a "suspect **[41 S.W. 3d at 354]** class."[8] Thus, the prohibition of homosexual sodomy is permissible if it is rationally related to a legitimate state interest.

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[7] *See* Acts 1943, 48 th Leg., p. 194, ch.112, § 1; Vernon's Ann. P.C. (1925) art. 524; Rev. P.C. 1911, art. 507; Rev. P.C. 1895, art. 364; and Rev.P.C.1879, art. 342.

[8] The Ninth Circuit Court of Appeals briefly held that homosexuals constitute a "suspect class," but that opinion was later withdrawn. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990). No other federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (all holding that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes).

See also Romer v. Evans, 517 U.S. 620, 631-32 (1996) (relying on the "rational relationship" test rather than "strict scrutiny" when assessing the constitutionality of Colorado's Second Amendment barring legislation favorable to homosexuals).

The State contends the statute advances a legitimate state interest, namely, preserving public morals. One fundamental purpose of government is "to conserve the moral forces of society." *Grigsby v. Reib*, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (Tex. 1913). In fact, the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral. Even our civil law rests on concepts of fairness derived from a moral understanding of right and wrong. The State's power to preserve and protect morality has been the basis for upholding such diverse statutes as requiring parents to provide medical care to their children,[9] prohibiting the sale of obscene devices,[10] forbidding nude dancing where liquor is sold,[11] criminalizing child endangerment,[12] regulating the sale of liquor,[13] and punishing incest.[14] Most, if not all, of our law is "based on notions of morality." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

Appellants claim the concept of "morality" is simply "the singling out [of] groups of people based on popular dislike

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[9] *Commonwealth v. Nixon*, 2000 WL 1741296, *5 (Pa. Nov. 27, 2000).

[10] *Yorko v. State*, 690 S.W.2d 260, 265-66 (Tex. Crim. App. 1985).

[11] *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1237-38 (R.I. 2000).

[12] *State v. Wilson*, 987 P.2d 1060, 1067 (Kan. 1999).

[13] *Altshuler v. Pennsylvania Liquor Control Bd.*, 729 A.2d 1272, 1277 (Pa. Commw. Ct. 1999).

[14] *Smith v. State*, 6 S.W.3d 512, 519-20 (Tenn. Crim. App. 1999).

or disapproval." Contending this practice was specifically condemned in *Romer v. Evans*, appellants argue that classifications based on sexual orientation can no longer be rationally justified by the State's interest in protecting morality. 517 U.S. 620 (1996). We find, however, that appellant's broad interpretation of *Romer* is not supported by the text or rationale of the Court's opinion.

In *Romer*, the Supreme Court considered the constitutionality of Colorado's universal prohibition of any statute, regulation, ordinance, or policy making homosexual orientation the basis of any claim of minority status, quota preferences, protected status, or claim of discrimination. Justice Kennedy, writing for the majority, first observed that the Fourteenth Amendment does not give Congress a general power to prohibit discrimination in public accommodations. *Id.* at 627-28. Thus, discrimination in employment, **[41 S.W. 3d at 355]** accommodations, and other commercial activities has historically been rectified by the enactment of detailed statutory schemes. *Id.* at 628. The Court cited, for illustration, several municipal codes in Colorado that prohibited discrimination on the basis of age, military status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, or sexual orientation. *Id.* at 629. To the extent these codes protected homosexuals, however, they were rendered invalid by Colorado's constitutional amendment.

In striking down the amendment, the Supreme Court declared that all citizens have the right to petition and seek legislative protection from their government. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. "A State cannot . . . deem a class of persons a stranger to its laws." *Id.* at 635. Thus, while no individual,

class, or group is guaranteed success, all persons have the right to *seek* legislation favoring their interests.

Here, appellants do not suggest that Section 21.06 unconstitutionally encumbers their right to seek legislative protection from discriminatory practices. Hence, *Romer* provides no support for appellants' position. *Romer*, for example, does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.[15]

Moreover, while appellants may deem the statute to be based on prejudice, rather than moral insight, our power to review the moral justification for a legislative act is extremely limited. The constitution has vested the legislature, not the judiciary, with the authority to make law. In so doing, the people have granted the legislature the exclusive right to determine issues of public morality.[16] If a court could **[41 S.W.**

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[15] In fact, the State of Colorado did not cite the preservation of morality as one of its legitimate interests in attempting to uphold the amendment. Rather, the state argued that it had a legitimate interest in: (1) protecting the freedom of association of its citizens, particularly those who might have personal or religious objections to homosexuality, and (2) conserving its resources to combat discrimination against other groups. *Id.* at 635.

[16] Where a statute does not run afoul of explicit constitutional protections, its moral justification is virtually unreviewable by the judiciary. When the rational basis for an Alabama statute outlawing certain sexual devices was challenged, the United States Eleventh Circuit Court of Appeals wro[illegible]:

3d at 356] overturn a statute because it perceived nothing wrong with the prohibited conduct, the judiciary would at once become the rule making authority for society—this the people have strictly forbidden. Accordingly, we must assume for the purposes of our analysis that the Legislature has found homosexual sodomy to be immoral.

The State also contends the legislature could have rationally concluded that "homosexual sodomy" is a different, and more reprehensible, offense than "heterosexual sodomy." This proposition is difficult to confirm because in American jurisprudence courts and legislatures have historically discussed the topic only in terms of vague euphemisms. In fact, statutes often made sodomy a criminal offense without ever defining the

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However misguided the legislature of Alabama may have been in enacting the statute challenged in this case, the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality. "The Constitution presumes that ... improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979). This Court does not invalidate bad or foolish policies, only unconstitutional ones; we may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

For the foregoing reasons, we hold the Alabama statute challenged in this case has a rational basis.

Williams v. Pryor, 229 F.3d 1331, 1339 (11 th Cir. 2000).

conduct. *See Commonwealth v. Poindexter*, 118 S.W. 943, 944 (Ky. 1909).

In its broadest common law form, the offense "consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast." *Prindle v. State*, 21 S.W. 360 (Tex. Crim. App. 1893). More restrictive definitions of sodomy, however, were commonly recognized. In many instances, for example, sodomy was restricted to carnal copulation between two human beings—sometimes further restricted to males (perhaps because it was difficult to "imagine that such an offense would ever be committed between a man and a woman"). *Wise v. Commonwealth*, 115 S.E. 508, 509 (Va. 1923). In any event, only homosexual conduct between *two men* was included among the early capital crimes of the Massachusetts Bay Colony.[17] Moreover, in some jurisdictions, including Texas, sodomy did not include oral sex. *Prindle*, 21 S.W. at 360; *Poindexter*, 118 S.W. at 944. Again, it is difficult to know whether this more narrow definition arose deliberately or was simply the product of legislative ignorance and/or judicial innocence. Conceivably, oral sex was "so unusual and unthinkable as perhaps not to have been even contemplated in the earlier stages of the law." *Wise*, 115 S.E. at 509.

Regardless of how these differing definitions of sodomy arose, we agree with the State's general contention that it has always been the legislature's prerogative to deem some acts more egregious than others. For example, the legislature has not chosen to make every homicide a capital offense; depending

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[17] Bestiality, however, was a capital offense whether committed by a man or a woman. THE LAWS AND LIBERTIES OF MASSACHUSETTS, at 5 (Cambridge 1648).

upon the circumstances, some homicides are first degree felonies,[18] some are second degree felonies,[19] some are state jail felonies,[20] and others are lawful.[21] Moreover, it is the duty of this Court to construe every statute in a manner that renders it constitutional if it is possible to do so consistent with a reasonable interpretation of its language. *Trinity River Authority v. UR Consultants, Inc. Texas*, 869 S.W.2d 367, 370 (Tex. App.—Dallas 1993), *aff'd*, 889 S.W.2d 259 (Tex. 1994). Accordingly, we find the legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than **[41 S.W. 3d at 357]** any such conduct performed by members of the opposite sex.

Because (1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a "suspect class," and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals, appellant's first contention is overruled.

Gender

Appellants also contend Section 21.06 unconstitutionally discriminates on the basis of gender. In

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[18] TEX. PEN. CODE ANN. § 19.02 (Vernon 1994).

[19] TEX. PEN. CODE ANN. § 19.04 (Vernon 1994).

[20] TEX. PEN. CODE ANN. § 19.05 (Vernon 1994).

[21] TEX. PEN. CODE ANN. §§ 9.32, 9.33, 9.42, & 9.43 (Vernon 1994)

Texas, gender is recognized as a "suspect class." *Barber v. Colorado Independent School Dist.*, 901 S.W.2d 447, 452 (Tex. 1995). In light of the Texas Equal Rights Amendment, classifications by gender are subject to "strict scrutiny" and will be upheld only if the State can show such classifications have been suitably tailored to serve a compelling state interest.[22]

Appellants claim Section 21.06 discriminates on the basis of sex because criminal conduct is determined to some degree by the gender of the actors. For example, deviate sexual intercourse is not unlawful *per se* in Texas. While the physical act is not unlawful as between a man and woman, it is unlawful when performed between two men or two women. Appellants contend that because criminality under the statute is, in some respects, gender-dependent, Section 21.06 runs afoul of state and federal equal protection guarantees.

The State asserts the statute applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women. Thus, the State maintains the statute does not discriminate on the basis of gender. Appellants respond by observing that a similar rationale was expressly rejected in the context of racial discrimination. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

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[22] Under the Fourteenth Amendment, gender classifications are analyzed according to an intermediate "heightened scrutiny" falling somewhere between the rational relationship test and strict scrutiny. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that under the Fourteenth Amendment, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives).

In *Loving*, the State of Virginia attempted to uphold its miscegenation statute in the face of an equal protection challenge by arguing that the statute did not discriminate on the basis of race because it applied equally to whites and blacks. The Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "[p]enalties for miscegenation arose as an incident to slavery." *Loving*, 388 U.S. at 6. Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id.*, at 10.

Here, the State of Texas employs a comparable argument, namely, Section 21.06 does not discriminate on the basis of gender because it applies equally to men and women. Appellants' contend the argument was discredited by *Loving* and should not be followed here. But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find **[41 S.W. 3d at 358]** nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find appellants' reliance on *Loving* unpersuasive.[23]

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[23] *See also Boutwell v. State*, 719 S.W.2d 164 (Tex. Crim. App. 1985). There the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code which, until its repeal in 1983, provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. Act of May 24, 1973, 63 rd Leg., R.S., ch. 399, § 21.10, 1973 Tex. Gen. Laws 918. When Boutwell was charged with sexual abuse of several boys, he argued the statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *Boutwell*, 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

> But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" *act* is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b).

Id. at 169; *see also Boulding v. State*, 719 S.W.2d 333 (Tex. Crim. App. 1986).

Boutwell has been severely criticized, but on grounds different than those at issue here. *McGlothlin v. State*, 848 S.W.2d 139, 138 (Tex. Crim. App. 1992); *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

While Section 21.06 alludes to sex, not every statutory reference to gender constitutes an unlawful "gender-classification." Texas law provides, for example, that counties are authorized to increase participation by *"women-owned* businesses" in public contract awards by establishing a contract percentage goal for those businesses;[24] when jurors are sequestered overnight, separate facilities must be provided for *male* and *female* jurors;[25] employers are prohibited from permitting, requesting, or requiring *female* children to work

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[24] TEX. LOC. GOV'T. CODE ANN. § 381.004 (Vernon 1999).

[25] TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon Supp. 2000).

topless;[26] the Director of the Texas Department of Transportation must report to each house of the legislature regarding the department's progress in recruiting and hiring *women*;[27] where a child is adopted by two parents, one must be *female* and the other *male*;[28] *female* patients being transported from a jail to a mental health facility must be accompanied by a *female* attendant;[29] circumcision of a *female* under the age of 18 is unlawful;[30] etc. Whether these and many other gender-specific statutes, violate the Texas Equal Rights Amendment is not before us. We must assume, however, that the legislature enacted these provisions with full knowledge of Article I, **[41 S.W. 3d at 359]** section 3a of the Texas Constitution and perceived no conflict. The legislature, for example, has specifically admonished the governor and supreme court to ensure the full and fair representation of women when making their appointments to the Board of Directors of the State Bar of Texas, but to also make no "regard to race, creed, sex, religion, or national origin." TEX. GOV'T CODE ANN. § 81.020 (Vernon 1998).

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[26] TEX. PEN. CODE ANN. § 43.251 (Vernon 1994).

[27] TEX. TRANS. CODE ANN. § 201.403 (Vernon 1999).

[28] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon Supp. 2000).

[29] TEX. CODE CRIM. PROC. ANN. art. 46.04 (Vernon Pamph. 2000).

[30] TEX. HEALTH & SAFETY CODE ANN. § 166.001 (Vernon Supp. 2000).

The legislature has mistakenly designated two different statutes as Section 166.001of the Health and Safety Code. Act of May 18, 1999, 76th Leg., R.S., ch. 450, § 1.02, 1999 Tex. Gen. Laws 2835 (Advance Directives Act) and Act of May 26, 1999, 76 th Leg., R.S., ch. 642, § 1, 1999 Tex. Gen. Laws 3213 (Female Genital Mutilation Prohibited).

The mere allusion to gender is not a talisman of constitutional invalidity. If a statute does not impose burdens or benefits upon a particular gender, it does not subject individuals to unequal treatment. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender); *see also Hayden v. County of Nassau*, 180 F.3d 42, 48-49 (2nd Cir. 1999) (entrance exam designed to diminish cultural bias on black applicants did not constitute a "racial classification" because it did not promote one race over another). While Section 21.06 includes the word "sex," it does not elevate one gender over the other. Neither does it impose burdens on one gender not shared by the other.

Where, as here, a statute is gender-neutral on its face, appellants bear the burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose. *Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 819 (4th Cir. 1995); *Keevan v. Smith*, 100 F.3d 16 644, 650 (8th Cir. 1996). Appellants have made no attempt to establish, nor do they even contend, that Section 21.06 has had any disparate impact between men and women. Rather, appellants complain only that the statute has had a disparate impact between homosexuals and heterosexuals. While we recognize the statute may adversely affect the conduct of male and female homosexuals, this simply does not raise the specter of gender-based discrimination.

As we already have determined, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general

welfare. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928). To the extent the statute has a disproportionate impact upon homosexual conduct, the statute is supported by a legitimate state interest. The first point of error is overruled.

PRIVACY

In their second point of error, appellants contend Section 21.06 violates the right to privacy guaranteed by both the state and federal constitutions. Appellants claim the intimate nature of the conduct at issue, when engaged in by consenting adults in private, is beyond the scope of governmental interference.

Neither the state nor federal constitutions contain an explicit guarantee of privacy. Thus, there is no general constitutional right to privacy. However, both constitutions contain express limitations on governmental power from which "zones of privacy" may be inferred. The United States Supreme Court has found five such zones in the Bill of Rights:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment. . .. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of **[41 S.W. 3d at 360]** the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self- Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to

> surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Similarly, the Texas Supreme Court has found "constitutionally protected zones of privacy emanating from several sections of article I of the Texas Constitution." *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996). These include: section 6, concerning freedom of worship; section 8, concerning freedom of speech and press; section 9, concerning searches and seizures; section 10, concerning the rights of an accused in criminal prosecutions; section 19, concerning deprivation of life, liberty and property, and due course of law; and section 25, concerning quartering soldiers in houses. *Id.*

Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here—the Fourth and Ninth Amendments.

The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.

The Ninth Amendment also offers no support. In *Bowers v. Hardwick*, the defendants were convicted of violating the Georgia sodomy statute. 478 U.S. at 190-91. Relying upon

Griswold v. Connecticut[31] and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers*, 478 U.S. at 191.

Likewise, under the Texas Constitution, we perceive that there are but two provisions that would arguably support appellants' position—sections 9 and 19 of Article I. Again, because appellants have not challenged the search leading to their arrest, we must conclude the police did not violate section 9 of the Texas Constitution.

Although neither the Texas Supreme Court nor Texas Court of Criminal Appeals has considered whether section 19 creates a zone of privacy that would protect private homosexual behavior, the Supreme Court has held it does not protect private *heterosexual* behavior. In *City of Sherman v. Henry*, the court was confronted with a case where the city had denied a promotion to a police officer because he was having an adulterous affair with the wife of another officer. *See Henry* 928 S.W.2d at 465. The court held that Article I, section 19 does not create a right of privacy protecting adulterous conduct without state interference.

[41 S.W. 3d at 361]

> [S]exual relations with the spouse of another is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this

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[31] 381 U.S. 479 (1965).

> Nation's history and tradition." Prohibitions against adultery have ancient roots. In the latter half of the 17th century in England, adultery was a capital offense. 4 WILLIAM BLACKSTONE, COMMENTARIES *64. The common law brought to this country by the American colonists included the crime of adultery as previously defined by the canon law of England. *United States v. Clapox*, 35 F. 575, 578 (D.Or.1888); FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW vol. 11,§§ 1719-20, p. 524 (9th ed. 1885). Adultery was still considered a crime by courts and commentators in the latter half of the 19th century when the Fourteenth Amendment was ratified. *See Clapox*, 35 F. at 578; WHARTON, *supra*. In fact, adultery is a crime today in half of the states and the District of Columbia.
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> While other states, including Texas, have recently repealed laws criminalizing adultery, the mere fact that such conduct is no longer illegal in some states does not cloak it with constitutional protection.

Id. at 470.

Similarly, we find homosexual conduct is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." In America, homosexual conduct was classified as a felony offense from the

time of early colonization.[32] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *Bowers v. Hardwick*, 478 U.S. at 193. In Texas, homosexual conduct has been a criminal offense for well over a century.[33]

In addition to an American tradition of statutory proscription, homosexual conduct has historically been repudiated by many religious faiths.[34] Moreover, Western civilization has a long history of repressing homosexual behavior by state action. Under Roman law, Justinian states that a *lex Iulia* imposed severe criminal penalties against "those who indulge in criminal intercourse with those of their own sex."[35] Blackstone states that the "infamous crime against nature, committed either with man or beast" was a grave offense among the ancient Goths and that it continued to be so under English

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[32] *See* LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[33] *See* Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art. 507 (1911); and Tex. Penal Code art. 524 (1925).

[34] "Our society's three major religions—Judaism, Christianity, and Islam—historically have viewed homosexuality as immoral." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 404 n.40 (1994) [citing The Jewish Torah (Leviticus 18:22, 20:13), the New Testament (Romans 1:26-28, I Timothy 1:9-10, I Corinthians 6:9-10) and the Koran (The Heights 7:80)].

[35] FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5 th ed., Oxford 1913).

common law at the time of his writing.[36] In his survey of the law, Montesquieu was prompted to conclude that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[37]

[41 S.W. 3d at 362]

Nevertheless, appellants contend that Texas should join several of our sister states who have legalized homosexual conduct. Certainly, the modern national trend has been to decriminalize many forms of consensual sexual conduct even when such behavior is widely perceived to be destructive and immoral, e.g., seduction, fornication, adultery, bestiality, etc.[38]

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[36] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16.

[37] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[38] Despite this trend, there are still to day many types of "private" conduct which courts have recognized are not protected from state interference. *See generally Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding there is no protected right to commit suicide); *Osborne v. Ohio*, 495 U.S. 103 (1990) (possession of child pornography not a protectable privacy interest even when possessed inside the home); *Bowers*, 478 U.S. at 195 (suggesting that adultery, even when committed in the home, is not a constitutionally protected behavior); *United States v. Miller*, 776 F.2d 978 (11 th Cir. 1985) (holding that constitutional right of privacy does not shield a person from personal possession of pornography outside the home); *Potter v. Murray City*, 760 F.2d 1065 (10 th Cir. 1985) (holding that because monogamy is inextricably woven into the fabric of our society, ban on plural marriage did not violate right of privacy); *United States v. Fogarty*, 692 F.2d 542 (8 th Cir. 1982) (holding there is no fundamental right to possess marijuana); *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8 th Cir. 1979) (holding right of privacy does not extend to commercialized sexual activities); *Kuromiya v. United States*, 37 F. Supp.2d 717 (E.D. Penn. 1999) (holding there is no fundamental right to smoke marijuana).

Our concern, however, cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature. While the Legislature is not infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good.[39]

Our role was aptly defined over a hundred years ago by Justice Noggle who, while writing for the Idaho Supreme Court, observed: "The court is not expected to make or change the law, but to construe it, and determine the power of the law and the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no

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[39] The fact that unlawful behavior is conducted in private between consenting adults may complicate detection and prosecution, but it does not, *ipso facto*, render its statutory prohibition unconstitutional. In upholding its sodomy statute, the Supreme Court of Louisiana wrote:

> The question of whether or not a third party is harmed by a consensual and private act of oral or anal sex is a debate which has been ongoing for many years and is nothing which this court needs to address. The legislature is within constitutional authority to proscribe its commission. Any claim that private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.
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> There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral. Simply put, commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself.

See State v. Smith, 766 So.2d 501, 509 (La. 2000).

consequence." *People v. Griffin*, 1 Idaho 476, 479 (1873). Because we find no constitutional "zone of privacy" shielding homosexual conduct from state interference, appellants' second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority, Consenting, and Dissenting Opinions filed March 15, 2001. (Justices Yates, Fowler, Edelman, Wittig, Frost, and Amidei join this opinion; **[41 S.W. 3d at 363]** Justice Yates also filed a concurring opinion in which Justices Hudson, Fowler, Edelman, and Frost join; Justice Fowler also filed a concurring opinion in which Justices Yates, Edelman, Frost, and Amidei join. Justice Anderson filed a dissenting opinion in which Senior Chief Justice Murphy joins.)*

En Banc.

Publish — TEX. R. APP. P. 47.3(b).

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* Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NO. 14-99-00109-CR & NO. 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 and 98-48531

CONCURRING OPINION
ON MOTION FOR REHEARING
EN BANC

[41 S.W. 3d at 363]

I agree with the result reached by, and reasoning utilized by, the majority opinion. However, I write separately only to address one of the arguments raised by amicus curiae. Amicus curiae alleges that by overruling the prior panel's decision, this Court will have succumbed to improper political pressure and asserts "[t]he best way for this Court to rebuke those who attempted to exercise improper political influence in the present case is to affirm the well-reasoned panel opinion."

The Texas Code of Judicial Conduct provides the guiding principals for every judge of this State in the performance of his or her judicial duties. TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998 & Supp. 2000). Each judge in Texas is instructed to "not be swayed by partisan interests, public clamor, or fear of criticism." *Id.* at Canon 3(B)(2). What amicus curiae requests this Court to do is, in effect, no different from what those who leveled political attacks against the majority in the panel opinion hoped to achieve, *i.e.*, a certain desired result.[1] In other words, amicus curiae asks this Court to shirk its bound duty in order to decide a difficult question of law differently from what it believes to be the correct resolution. Amicus curiae's request is grounded on the mistaken notion that any different result must surely be on the basis of political pressure, without crediting the members of this Court with the integrity to carry out their duties in strict accordance with the Texas Code of Judicial Conduct and with careful consideration of the legal issues presented in this appeal. As amicus curiae suggests, attacks on the judiciary, like the one

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[1] In its brief to this Court, amicus curiae describes the political attacks as including a "letter circulated by local [Republican party] officials in an attempt to influence the outcome of the case."

following the panel opinion, may have the effect of increasing the potential that the public's confidence in our courts will diminish because of a perception, however erroneous, that we have made a political decision, not a legal one. But the response to such a reckless and irresponsible act cannot be that we ignore our duty to decide the law we have been entrusted to interpret. Attempts to politicize this opinion—regardless of their origin—have no place in our decision making process, nor are attacks from opposing interests immune from creating the very same perception in the mind of the public that may now exist as a result of earlier inappropriate attempts to influence this decision.

"Judges are called upon to make hundreds of decisions each year. These decisions are made after consideration of opposing contentions, both of which are often based on reasonable interpretations of the laws of the United States and the Constitution." *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, 215 N.Y.L.J. 4 (March 29, 1996). Unless there is a basis for disqualification or recusal, all judges must decide the matter brought **[41 S.W. 3d at 364]** before them. TEX. CODE JUD. CONDUCT, Canon 3(B)(1); *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., responding to Justice Gammage's declaration of recusal) (citing *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 823–24 (Tex. 1972)). As one jurist has commented with regard to our duty to decide difficult matters presented to us:

> All judges face the likelihood of being publicly criticized . . . for decisions that they render. It goes with the territory. A judge's oath is to decide cases based on the law and the facts . . .
>
> .

Carl E. Stewart, *Contemporary Challenges to Judicial*

Independence, 43 LOY. L. REV. 293, 306 (1997). There is simply no place for suggesting that the members of this Court are pandering to certain political groups or deciding a case as a means to achieve a politically desired end.[2] And to do so only adds unnecessarily to the already politically charged climate created by the people amicus curiae purports to condemn.

Today we have been called upon to decide whether section 21.06 of the Texas Penal Code lacks a rational basis or otherwise violates the constitutional right to privacy found in the constitutions of either Texas or the United States. We have done so—not because of political pressures, as amicus curiae has suggested, but despite them.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.
En banc.
Publish — TEX. R. APP. P. 47.3(b).

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[2] *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 313 (1997) (observing that "[i]t is irresponsible for critics of the courts to argue that only results matter, without regard to the legal principles that govern judicial decision making").

Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

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CONCURRING OPINION ON MOTION FOR REHEARING EN BANC

[41 S.W. 3d at 364]

Today the Court holds that section 21.06 of the Texas Penal Code is not unconstitutional. I join in the court's opinion, however I write separately to make the following comments.

First, once the decision is made that the classifications in section 21.06 are not gender based, the analysis is relatively straightforward. A gender-based classification would require a heightened scrutiny of section 21.06 because gender is a protected class. However, sexual preference has not been designated a protected class by the United States Supreme Court, the Texas Supreme Court, or the Texas Court of Criminal Appeals. *See* Majority Op. n.8 *supra*. Consequently, in deciding whether 21.06 is constitutionally sound, we look only for a rational relationship between section 21.06 and the State's reasons for enacting it.[1]

The State argues that 21.06 is directly related to the legislature's right to legislate morality. The United States Supreme Court has held that it is within a State's legitimate police power to legislate on grounds of morality. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Berman v. Parker*, 348 U.S. 26, 32 (1954). Thus, we need only determine if section 21.06 is related "to the pursuit " of implementing morality.

The United States Circuit Court for the Fifth Circuit has already held that 21.06 concerns issues of morality. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985). In reviewing section 21.06, that court held, "[i]n view of the strong objection to

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[1] The dissent argues that the rational relationship test we are to use here is a higher standard than the rational relationship test normally is; however, that distinction is not apparent in the case law, and the dissent does not point to any particular language that supports this argument.

homosexual **[41 S.W. 3d at 365]** conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that section 21.06 is 'totally unrelated to the pursuit of,' implementing morality, a permissible state goal." (internal citations omitted). That is the same justification upon which the majority relies to reach the conclusion that the Texas Legislature was exercising valid legislative powers in enacting section 21.06. I agree that the justification is legally sound. It is not our duty to assess the wisdom or desirability of the law, *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), nor does "[t]his court ... invalidate bad or foolish policies, only unconstitutional ones; we may not 'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* As the majority states, "our power to review the moral justification for a legislative act is extremely limited."

Secondly, I concur with the majority in its rationale and holdings as to both the Equal Protection and Privacy sections of the opinion. I would only add that, as to whether section 21.06 unconstitutionally discriminates on the basis of gender, it clearly does not. This is not merely because of the equal application of the statute to men and women, but because this statute does not contain a discriminatory classification based on gender.

The dissent contends that, like the statute struck down in *Loving v. Virginia*, this statute "equally punishes," in this case, based on gender classification, which makes the statute gender based. 388 U.S. 1 (1967). That argument is creative, but misguided. In *Loving*, the Court struck down a statute because the statute furthered a loathsome discrimination — racism that implied a "superior" white person marrying an "inferior" black person does so at the risk of both being punished. The *Loving*

court correctly recognized that this was the kind of discriminatory law sought to be vanquished by the Fourteenth Amendment; one that advanced the fallacy of racial superiority. However, *Loving* is not on point in this case because section 21.06 does not advance the fallacy of gender superiority. It prohibits a same-sex sexual relationship. The fact that sexual orientation necessarily depends upon the sex of the parties does not mean that section 21.06 is the kind of statute that *discriminates* on the basis of gender. Gender is treated as an elevated class under the Fourteenth Amendment because this country saw a need to rid itself of outdated notions of a woman's inferiority to a man.[2] *Reed v. Reed*, 404 U.S. 71 (1971); *Phillips v. Marietta Corp.*, 400 U.S. 542 (1971); *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F.Supp. 593 (S.D.N.Y. 1970); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971). There is nothing in section 21.06 that furthers any unequal treatment between the sexes. The dissent's argument to the contrary is not a legally sustainable one.

Finally, I also take issue with the dissent's treatment of the majority's reliance on *Bowers v. Hardwick*. The dissent correctly points out that *Bowers v. Hardwick* deals with the Due Process Clause, while the majority's analysis depends upon the Equal Protection Clause of the Fourteenth Amendment. The dissent remarks that **[41 S.W. 3d at 366]** "[t]his blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments." I disagree.

First, the dissent overlooks the fact that the ultimate analysis in both *Bowers* and this case turns on the application

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[2]As the majority stated, "neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a 'suspect class.'"

of the rational basis test. This test does not differ depending on whether it is applied in a "due process" or an "equal protection" context. The test remains the same: does the statute further some legitimate, articulated state purpose? *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 461-62 (1988) (analyzing a Fourteenth Amendment Equal Protection claim based on whether the statute at issue had a "rational relation to a legitimate government objective . . ."); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488, (1955) (analyzing a Fourteenth Amendment Due Process claim under the rational basis test by stating, ". . . to be constitutional, [i]t is enough that there is an [issue] at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *see Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (analyzing a Fifth Amendment Due Process claim using a rational basis test drawn from Equal Protection cases that stated the statute must be "rationally based and free from invidious discrimination . . ."). *Bowers* holds that states are within the scope of legislative authority – and further a legitimate state purpose – when their legislatures base laws on concepts of morality. Therefore, the application of *Bowers* does not "blunt[] the force of the majority's equal protection arguments."

Secondly, the dissent charges that the majority merges *Bowers'* due process analysis with the equal protection issue in this case. That statement is incorrect. The majority cites *Bowers* only three times: (1) in reference to legislating on notions of morality; (2) in reference to the privacy issue; and (3) for the contention that sodomy was an offense in all fifty states and in the District of Columbia prior to 1961. The majority's analysis of whether section 21.06 should be subject to some level of

heightened scrutiny in an equal protection analysis does not depend on the *Bowers* decision. The dissent's implication to the contrary is inaccurate.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.
En banc.
Publish — TEX. R. APP. P. 47.3(b).

Affirmed on Rehearing En Banc: Majority and Dissenting Opinions of June 8, 2000, Withdrawn, and Substitute Majority, Concurring and Dissenting Opinions filed March 15, 2001.

In The
Fourteenth Court of Appeals

NOS. 14-99-00109-CR &
14-99-00111-CR

JOHN GEDDES LAWRENCE AND TYRONE GARNER, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court At Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 and 98-448531

DISSENTING OPINION

[41 S.W. 3d at 366]

I respectfully dissent to the majority's Herculean effort to justify the discriminatory classification of section 21.06 of the Penal Code despite the clear prohibitions on such discrimination contained in the Equal Protection Clause of the United States Constitution and the Texas Equal Rights Amendment in the Bill of Rights of the Texas Constitution.

Appellants are before this court challenging the constitutionality of Texas Penal Code section 21.06. They bring four issues: (1) whether the statute violates the right to federal constitutional equal protection *as applied and on its face*; (2) whether the statute violates the right to state constitutional equal protection *as applied and on its face*; (3) whether the statute violates the appellants' right to privacy under the Texas Constitution; and (4) whether the statute violates the appellants' right to privacy under the United States Constitution.

I believe appellants' federal right to privacy challenge is controlled by the Supreme Court's determination in *Bowers v. Hardwick*. The Due Process Clause of the Federal Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. 478 U.S. 186 (1986). I would reach the same conclusion on appellants' **[41 S.W. 3d at 367]** privacy claim under the Texas Constitution. The Texas Supreme Court, borrowing heavily from *Bowers*, denied the existence of an asserted privacy right by insisting that adultery is "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *Henry v. City of Sherman*, 928 S.W.2d 464, 470 (Tex. 1996). "Because homosexual conduct is not a fundamental right under the United States Constitution, adultery, likewise, cannot be a fundamental right." *Id.* Accordingly, I concur in the result reached by the majority on appellants' third and fourth issues,

but for the reasons set forth below, strongly disagree with the majority's treatment of appellants' state and federal equal protection arguments.

I.
Application of Equal Protection to Section 21.06: An Overview

Appellants contend section 21.06 violates their rights of equal protection under the United States and Texas Constitutions. Under the Fourteenth Amendment, the statute must fail because even applying the most deferential standard, the rational basis standard, the statute cannot be justified on the majority's sole asserted basis of preserving public morality, where the same conduct, defined as "deviate sexual intercourse" is criminalized for same sex participants but not for heterosexuals. The contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislatures' unconstitutional edict. The statute must also fail because statutory classifications that are not gender neutral are analyzed under the heightened scrutiny standard of review, and there is no showing by the State either that there is an exceedingly persuasive justification for the classification, or that there is a direct, substantial relationship between the classification and the important government objectives it purports to serve.

Similarly, section 21.06 cannot withstand scrutiny under the Texas ERA, Article I, §3a of the Texas Constitution. The ERA is part of the Texas Bill of Rights. Under Article I, § 29 of the Bill of Rights, the Inviolability Clause, statutes that contravene anything in the Bill of Rights are *per se* void. Because section 21.06 discriminates on the basis of gender, thus

violating Article I, §3a, it is void. Moreover, applying the less rigorous standard of strict scrutiny, mandated by *McLean*, produces the same result. *In re McLean*, 725 S.W.2d 696 (Tex. 1987). Under strict scrutiny as applied in Texas, the proponent of gender discrimination must demonstrate a compelling interest and that there is no other manner to protect the state's compelling interest. *Id.* This requirement places the burden to support the statute squarely upon the State and not on the challenger, and the State, as discussed here and in this Court's original opinion, has failed to make the required showing to defeat a challenge under the Texas ERA.

II.
Section 21.06 and the Fourteenth Amendment: Equal Protection, Gender, and Heightened Scrutiny Review

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). The general rule is that legislation is presumed valid and will be sustained if the **[41 S.W. 3d at 368]** classification drawn by the statute is rationally related to a legitimate state interest. *Id.* However, within the three-tiered federal equal protection scheme, legislative classifications based on gender call for a heightened standard of review, one step below the most rigorous strict scrutiny review applied to statutory classifications based on race, alienage, or national origin. *Id.* Under the heightened standard, a gender classification fails unless it is substantially

related to a sufficiently important governmental interest. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).[1]

A. *Section 21.06 Is Not Gender Neutral*

In its analysis of appellants' gender discrimination contention, the majority attempts to transfer the burden of proof to appellants to show the statute has had an adverse effect upon one gender, and that such disproportionate impact can be traced to a discriminatory purpose. This transfer is based on the naked assertion that section 21.06 is gender-neutral because it does not impose burdens on one gender not shared by the other. That 21.06 is not gender neutral is manifest based on application of the statute to the following events:

> There are three people in a room: Alice, Bob, and Cathy. Bob approaches Alice, and with her consent, engages with her in several varieties of "deviate sexual intercourse," the conduct at issue here. Bob then leaves the room. Cathy approaches Alice, and with her consent, engages with her in several kinds of "deviate

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[1] The best short analysis of the three tests for considering whether legislation violates the Equal Protection Clause of the Fourteenth Amendment is set out in *Clark v. Jeter*, 486 U.S. 456, 461 (1988):

> At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights are given the most exacting [or strict] scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

> sexual intercourse." Cathy is promptly arrested for violating section 21.06.

I have indulged in this tableau to demonstrate one important point: one person simply committed a sex act while another committed a crime. While the acts were exactly the same, the gender of the actors was different, and it was this difference alone that determined the criminal nature of the conduct. In other words, because he is a man, Bob committed no crime and may freely indulge his predilection for "deviate sexual intercourse," but because she is a woman, Cathy is a criminal. Thus, women are treated differently in this scenario, and therefore, are discriminated against by the explicit gender-based prohibition of section 21.06, and to suggest otherwise is disingenuous at best.[2] It is also no answer to insist that because the statute also subjects men to similar discrimination in different scenarios, somehow the discrimination here is rendered constitutionally acceptable. Discrimination in one instance is not cured by additional discrimination in another. Moreover, section 21.06 grew out of the revision of the penal code in 1973.[3] In the new statute, two **[41 S.W. 3d at 369]** standards were created, demarcated by the sex of the actors: deviate sexual intercourse when performed by a man and a woman would henceforth be legal, but deviate sexual intercourse performed by two men or two women would remain

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[2] The characteristic injury of gender discrimination lies not in the failure to be treated on a gender-blind basis, but rather in being deprived of opportunity because one is a woman, or because one is a man. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-29 (2d. ed. 1988).

[3] Convening in 1973, the 63 rd Legislature, passed the revised Penal Code, which was enacted in 1974. *See* Acts 1973, 63 rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

illegal. Thus, after 1974, the distinction between legal and illegal conduct was clearly not the act, but rather the sex of one of the participants.

B. *Equal Discrimination Argument Not A Cure*

While not precisely a model of clarity, the majority appears to accept the State's contention that because section 21.06 applies equally to men and women, the statute does not discriminate on the basis of gender. I draw this conclusion based on the majority's rejection of appellants' argument that *Loving v. Virginia*, 388 U.S. 1 (1967) discredited the "equal application" defense of 21.06, and conclusion that 21.06 does not impose burdens on one gender not shared by the other. However, the United States Supreme Court has rejected the majority's position in a variety of cases.

One example of the Court's rejection of the "equal discrimination" argument is found in *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden,* 465 U.S. 208, 217-18 (1984). In that case, the Supreme Court invalidated a municipal ordinance in Camden, New Jersey, requiring that at least forty percent of employees working on city construction projects be city residents. Camden's Mayor and City Council argued the ordinance did not violate the strictures of the Privileges and Immunities Clause of the Fourteenth Amendment, which requires that out-of-state residents be afforded the same job opportunities as in-state residents, because not only out-of-state residents were burdened by the ordinance. In fact, the respondents argued, many in-state residents, who did not live within the city of Camden, were as burdened by the ordinance as the out-of-state workers who brought the suit. Rejecting the "equal discrimination" argument, the Supreme Court stated "the

Camden ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." *Id.* (citing *Zobel v. Williams*, 457 U.S. 55, 75 (1982) (O'Connor, J., concurring)).

A second example of the Court's rejection of additional "curative" discrimination is noted in *Hunter v. Underwood*, 471 U.S. 222 (1985). In *Hunter*, the Court struck down a provision of the Alabama Constitution that mandated disenfranchisement for people who committed "crimes of moral turpitude." Although facially neutral, the Court determined the provision was enacted with the intent of discriminating against blacks and disparately impacted blacks as well because it had disenfranchised ten times as many blacks as whites. *Id.* at 227. Appellant, the State of Alabama, argued that although the constitutional provision was intended to discriminate against blacks, it did not violate the Equal Protection Clause because it was also intended to discriminate against poor whites. The Court held that the intention to additionally discriminate against whites "hardly saves [the Alabama provision] from invalidity." *Id.* at 231. An additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against blacks. *Id.* at 232. **[41 S.W. 3d at 370]** Thus, again, the Court declined to accept additional discrimination as a purported cure for a clearly discriminatory law.

Finally, the Supreme Court discussed the logic of an argument analogous to the State's argument here in *Loving v. Virginia*, 388 U.S. 1 (1967). There, the State of Virginia argued that Virginia's miscegenation statutes do not constitute invidious racial discrimination because the statutes apply equally to whites and blacks. *Id.* at 8. The miscegenation statutes, the State contended, equally penalized both whites who intermarried and blacks who intermarried; therefore, the "equal application" of the statutes rendered them acceptable under the

Fourteenth Amendment using a rational basis standard. *Id.* Rejecting this sophistry, the Court responded that the mere equal application of a statute containing racial classifications does not remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination. *Id.* By using the race of an individual as the sole determinant of the criminality of his conduct, the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment. *Id.* at 11. Accordingly, the Court reaffirmed the propriety of strict scrutiny and struck down the Virginia statutes as unconstitutional. *Id.* at 12.

I would also reject the equal application argument offered here. Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, neither salvages nor cures the discriminatory classification contained in this statute. The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual, not the conduct, is the sole determinant of the criminality of the conduct.

Indeed, the State's and the majority's utilization of the equal application justification for 21.06 detrimentally impacts their unified position. If in *Loving* the equal application of the anti- miscegenation statutes to both blacks and whites did not negate the existence of a racial classification, then here, equal application of the anti-homosexual-sodomy statute to both men and women does not negate the existence of a sex classification. Alternatively, if 21.06 does not contain a sex-based classification because it applies equally to men and women, then the anti-miscegenation statutes in *Loving* did not contain a race-based classification, with the logical corollary that *Loving* was wrongly decided. Here, the State and the majority go to great lengths to manufacture a conclusion that 21.06 is

gender neutral. They must, because acknowledging the facial and as applied gender discrimination within 21.06 vitiates any defense of that statute inasmuch as the State has failed to establish either that the classification created by the statute is substantially related to important and legitimate government objectives, the test applied under heightened scrutiny, or identify a compelling state interest for purposes of strict scrutiny.

The issue regarding whether 21.06 is gender neutral lies at the core of this case. The majority, in a somewhat cursory fashion, dispenses with *Loving* and moves quickly to the conclusion of gender neutrality without addressing, among other things, the tableau set forth above in this part II. This conclusion of neutrality is essential for the majority to access the rational basis review, avoid heightened scrutiny mandated for gender discrimination, and most importantly, avoid any analysis of appellants' claims under the Texas **[41 S.W. 3d at 371]** ERA. However, limiting analysis of 21.06 to rational basis review is incomplete.

In an equal protection analysis of a legislative classification such as that drawn in 21.06, the appropriate framework for reviewing the scheme is to first ask whether the law survives rational basis analysis, and, if it does, the second inquiry is whether the distinction will pass heightened scrutiny. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985). Both *Hooper* and *Zobel v. Williams*, 457 U.S. 55 (1982) analyzed statutory classifications violating the Equal Protection Clause by deferring heightened scrutiny analysis until a determination is made that it survived a rational basis analysis. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986). Thus, here, because the majority has determined that 21.06 survives rational basis scrutiny, and fails to then apply

heightened scrutiny review, its analysis under the Equal Protection Clause is incomplete. *Romer v. Evans*, 517 U.S. 620 (1996) is consistent with this approach. There, because Amendment 2 was in violation of the Equal Protection Clause applying rational basis review, there was no need to examine the statute under heightened scrutiny. Thus, the majority's conclusion that 21.01 is gender neutral will not allow omission of heightened scrutiny review.

C. *Standard of Review For Gender Discrimination*

Inasmuch as section 21.06 is not gender-neutral, the next inquiry is determining the appropriate burden of proof and assigning that burden. In 1982, in *Mississippi University for Women*, the Court held that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. 458 U.S. at 724. The burden is met only by showing, at a minimum, that the classification serves important governmental objectives. *Id.* There is, however, a further inquiry if the State's objective is legitimate and important. The reviewing court must then determine whether the requisite direct, substantial relationship between the objective sought and means used is present. *Id.* This is heightened scrutiny.

The Supreme Court again addressed the issue of whether the Equal Protection Clause forbids gender based discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Specifically, the Court examined the use of peremptory challenges on the basis of gender under the dictates of the Equal Protection Clause and the court's holding in *Batson v. Kentucky*, which prohibits peremptory strikes solely on the

basis of race. 476 U.S. 79 (1986). The court held the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender. *J.E.*B., 511 U.S. at 146. In reaching that conclusion, the *J.E.B* Court acknowledged that "our Nation has had a long and unfortunate history of sex discrimination," a history which warrants the heightened scrutiny afforded all gender-based classifications. *Id.*

In *United States v Virginia*, 518 U.S. 515, 533 (1996), the Supreme Court reiterated the burden of proof for cases of official classification based on gender as requiring the reviewing court to determine whether the proffered justification is exceedingly persuasive, and declared "[t]he burden of justification is demanding and it rests entirely on the State." Further, the Court held that the justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. *Id.* And, it must not **[41 S.W. 3d at 372]** rely on overbroad generalizations about different talents, capacities, or preferences of males and females. *Id.* This is the heightened review standard applied to classifications based on sex. *Id.*

D. *Failure to Satisfy the Heightened Scrutiny Standard*

In its original brief filed with this court, the State contends that section 21.06 must be upheld if there is any rational relationship between the disparity of treatment reflected in that statute and a legitimate state interest. The State seeks to apply the general rule that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440. To satisfy the rational relationship burden, the State asserts the statute is rationally related to permissible governmental purposes, the discouragement of

behavior historically perceived to be immoral, and the promotion of family values. This assertion was reiterated in the State's brief in support of its motion for rehearing en banc. The majority also adopts this rational relationship standard.[4] The

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[4] The majority's entire analysis of appellants' equal protection issues is premised on the belief that 21.06 is gender neutral on its face. The comparison of 21.06 and the definition of "deviate sexual intercourse" in 21.01 set out in note 9 below, I believe, adequately dismantles facial neutrality contentions. This misinterpretation of 21.06 has led the majority into error. Moreover, for unexplained reasons, the majority has merged a due process analysis with an equal protection analysis by stating there is no fundamental right to engage in sodomy. Whatever the merits of that contention, it is sourced from the Court's analysis of the Due Process Clause in *Bowers v. Hardwick* where the Court was unwilling to extend the Due Process Clause to confer "a fundamental right to engage in acts of consensual sodomy." 478 U.S. 186, 192 (1986). This blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments. Indeed, that the majority is in fact attempting to analyze 21.06 under the Due Process Clause is manifest from (a) its failure to address how a ban of homosexual sodomy preserves public morals while permitting heterosexual sodomy, but (b) justifying the statute based on historical analysis and the common law, and references to seventeenth century laws banning homosexual conduct in the Massachusetts Bay Colony. *See* discussion of Cass Sunstein's analysis of the distinctions between the Due Process and Equal Protection Clauses at note 12 below.

Nevertheless, even assuming the statute is gender neutral on its face, it is not gender neutral as applied, an argument also advanced by appellants. I have, in part II A above, demonstrated the application of section 21.06 is not gender neutral when applied to appellants. The majority recognizes that a facially neutral statute may support an equal protection claim where it is motivated by discriminatory intent and its application results in a discriminatory effect, citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Despite this acknowledgment of the rule, the majority prefers here, as elsewhere in the opinion, to impose a burden of proof not required in an inquiry based on gender discrimination. The Supreme Court has consistently subjected gender-based classifications to heightened scrutiny in recognition of the real

State's and the majority's arguments that 21.06 survives a challenge under federal equal protection are untenable.[5]

First, the State and the majority have applied the wrong standard. As set out in *City of Cleburne*, the three standards of equal protection review, from highest to **[41 S.W. 3d at 373]** lowest, are strict scrutiny, heightened review, and rational relationship. 473 U.S. 440-441. Under *Heitman v. State*, the court held that decisions of the Supreme Court represent the minimum protections that a state must afford its citizens. 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). The federal constitution sets the floor for individual rights, and state constitutions cannot subtract from the rights guaranteed by the United States Constitution; however, they can provide additional rights to their citizens. *Id.* It appears, therefore, that the State and the majority have attempted to apply a lower threshold standard of review to gender-based discrimination than the heightened standard mandated by the United States Supreme Court. It is not within the discretion of an intermediate court to ignore United States Supreme Court

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danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations. *J.E.B.*, 511 U.S. 127, 135 (1994).

[5] The majority's statement that the State can, in many instances, pass laws the purpose of which is to preserve morals is correct. However, that license is subject to the Equal Protection Clause, and if the statute is not rationally related to the asserted State interest, or classifies on the basis of gender without a compelling state interest, the license is revoked.

precedent regarding the appropriate standard of review for gender based classifications challenged, as appellants have done here, under the Equal Protection Clause of the Fourteenth Amendment. The court in *Heitman* stated the rule more succinctly: this court is not at liberty to reduce the protections afforded its citizens to a level less than that established under the federal constitution. 815 S.W.2d at 690. *A fortiori*, by applying the improper standard of review, the majority has accomplished the following: it has afforded appellants a level of protection less than that prescribed by courts whose opinions we are required to follow.

Second, the majority apparently has accepted the State's obfuscation of the issue of gender discrimination in 21.06, thus lowering the State's burden of proof. It is well established that a gender classification fails unless the party seeking to uphold the statute satisfies the dual burden of showing a persuasive justification or objective for the classification and that the discriminatory means employed are substantially related to the objective. *Mississippi Univ. for Women*, 457 U.S. at 724-725. Where, as here, there is not even a whisper or hint in the majority opinion purporting to demonstrate how the State satisfied the *minimum* rational relationship showing required to sustain 21.06 in the face of an equal protection challenge, it is difficult to understand how the majority can conclude 21.06 does not violate appellants' federal equal protection rights.[6]

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[6] As noted above, the majority's equal protection analysis is incomplete because it fails to engage in intermediate scrutiny required for review of a challenged classification under the Equal Protection Clause where, as here, the majority has concluded 21.06 satisfies rational basis

E. *Proper Application of Heightened Scrutiny Review*

Turning now to the case *sub judice*, a rather succinct two part test exists for evaluating the validity of the gender-based classification in 21.06 against a federal equal protection challenge, and it is couched in terms of dual burdens on the proponent of the statute: (1) has the proponent demonstrated a legitimate and exceedingly persuasive justification for the gender based classification contained in 21.06; and (2) has the proponent demonstrated the requisite direct, substantial relationship between the classification and the important government objectives it purports to serve. *Heckler v. Mathews*, 465 U.S. 728, 745 (1984).

(1). The justification asserted here for 21.06 is promotion of family values and discouragement of immoral behavior. At the outset, it should be noted that "promotion of family values" has not been defined by the State, but it is not illogical to assume that it has some relationship to the **[41 S.W. 3d at 374]** institution of marriage and procreation. Thus, the State's contention must be that permitting deviate sexual intercourse between heterosexual couples promotes family values while such conduct by same sex couples promotes something less than that. What is interesting to note is the fact that deviate sexual intercourse, as defined in section 21.01 of the Penal Code, regardless of the gender of one's sex partner, will not permit a female's ovum to be fertilized, thus creating a pregnancy. It must, therefore, be concluded that the State's acquiescence in heterosexual deviate sexual intercourse permits heterosexuals, whether married or not, to engage in a variety of historically repugnant "recreational sex" acts. To contend, as

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review. *Hooper*, 472 U.S. at 618.

the State must, that a man somehow promotes family values by engaging in deviate sexual intercourse with a woman, but undermines those values by performing the same deviate sex act with a man, does not, in my view, constitute a showing of an exceedingly persuasive justification for the gender based classification in 21.06.[7]

Nor does the asserted justification of discouraging immoral behavior constitute such a showing. The behavior to be *discouraged* is deviate sexual intercourse between same sex co: les. That same behavior between heterosexual couples is, by implication, moral and something to be *encouraged*. Sodomy is either immoral or it is not. It appears that the State's vigorous defense of 21.06 has been advanced without due consideration of the inconsistency of, on the one hand, condemning sodomy as immoral, but on the other implicitly embracing sodomy as perfectly moral. Again, such incongruity is not exceedingly persuasive.

(2). Because the test articulated in *Heckler* is described in the conjunctive, it follow s that if the State has failed to articulate a legitimate and exceedingly persuasive justification, we need not reach the second part of the test. Nevertheless, even if family values and prevention of immoral behavior were legitimate and persuasive justifications for the gender classification, the discussion above demonstrates there is no connection between penalizing homosexual sodomy and the achievement of those objectives. Neither heterosexual sodomy

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7 Because the Court in *Romer v. Evans*, 517 U.S. 620 (1996), implicitly rejected the justification of promoting family values in a rational basis analysis of a statute that discriminated against homosexuals based on sexual orientation, it follows that those same justifications, advanced here, could not satisfy heightened scrutiny. *See* part III below.

nor homosexual sodomy can create a new life. Further, encouraging heterosexual sodomy and punishing homosexual sodomy, as a Class C misdemeanor with a fine only, scuttles the State's asserted purpose of preventing immoral behavior inasmuch as 21.06 permits deviate sexual intercourse by any man with any woman. Thus, the State has failed to make a showing of how the gender- based classification is substantially and directly related to the proffered objective of discouraging immoral behavior. Perhaps this failure rests, in part, on the apparent impossibility of logically explaining how the classification in 21.06 is even remotely related to that objective where such behavior is simultaneously sanctioned and is presumably engaged in routinely. Where, as here, the proponent of a gender-based statutory classification fails to establish the requisite relationship between the objective and the means used to achieve it, the statute is invalid . *See Mississippi Univ. for Women*, 458 U.S. at 730.

The mere recitation of a benign purpose is not an automatic shield that protects **[41 S.W. 3d at 375]** against any inquiry into the actual purposes underlying a statutory scheme. *Id.* at 728. Having performed the analysis dictated by intermediate scrutiny, it must be concluded the State failed both to articulate a persuasive justification and to demonstrate a direct relationship between the tendered objectives and the means utilized to achieve those objectives in 21.06. In the absence of legitimate objectives, the inevitable inference is raised that the disadvantage to homosexuals contained in 21.06 is born of animosity toward the persons affected. *See Romer*, 517 U.S. at 634. The Legislature's removal of the prohibition on heterosexual sodomy while retaining it for homosexual

sodomy cannot, in my view, be explained by anything but animus toward the persons it affects.[8]

Indeed, the State's purported justification for the classification in 21.06 in terms of upholding public morality founders on the distinction between public and private morality. The private morality of an individual is not synonymous with nor necessarily has an effect on what is known as public morality. The majority believes 21.06 preserves public morals. That conclusion is apparently reached *sua sponte* without the slightest showing by the State that such consequence flows from enforcement of 21.06. As set forth above, the State's general contention is that the statute discourages immoral behavior, without regard to the public or private nature thereof. Nevertheless, addressing the majority's contention, we are not told how government interference with the practice of adult only, consensual personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of "public morality" or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State. Here again, when one applies the clear test, articulated in *Heckler* and elsewhere, that a gender-based classification must fail an equal protection challenge absent a showing that the classification is substantially and directly related to the preservation of public

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[8] My conclusion that 21.06 was born out of animus towards the persons affected thereunder is buttressed by the statute's evolution. Until 1974, the penal code prohibited oral and anal copulation "with another human being." Thus, the statute prohibited all acts of sodomy, whether performed by members of the opposite or the same sex. *Pruett v. State*, 463 S.W.2d 191, 193 (Tex Crim. App. 1970). In 1974, a new penal code was enacted wherein sodomy performed by members of the same sex continued to be proscribed, but the same act performed by members of the opposite sex became, for the first time in 114 years, legal.

morality, the conclusion is obvious. Perhaps this is the reason the majority labors so hard to conclude 21.06 is gender neutral.[9]

III.
Equal Protection, Improper Classifications and Rational Basis Review

A. Romer v. Evans

I firmly believe 21.06 establishes a gender-based classification, on its face and as **[41 S.W. 3d at 376]** applied, in the Penal Code of the State of Texas that will not withstand middle tier scrutiny mandated for the analysis of such classifications under the Equal Protection Clause of the Fourteenth Amendment. Appellants, however, also challenge the statute because it unconstitutionally discriminates against homosexuals, thus imposing an unequal burden on them based on their sexual orientation because heterosexuals are not targeted by 21.06 when engaging in the same conduct. Here, the rational basis test, much preferred by the State, *is* applicable, but the result of a correct analysis applying federal precedent is contrary to the outcome sought by the State.

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[9] That 21.06 is not gender neutral on its face is demonstrated by the language in the statute. "A person commits an offense if he engages in deviate sexual intercourse *with another individual of the same sex*." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994) (emphasis added). The statute clearly specifies what the gender of the actors must be to constitute a criminal offense. Curiously, the definition of "deviate sexual intercourse" contained in section 21.01 is gender neutral. Such conduct is defined as "any contact between any part of the genitals of *one person* and the mouth or anus of *another person*; or ...the penetration of the genitals or the anus of *another person* with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994) (emphasis added).

The case that controls the disposition of appellants' contention that section 21.06 discriminates against a class based on sexual orientation is *Romer v. Evans*, 517 U.S. 620 (1996).[10] In *Romer*, the United States Supreme Court held that a Colorado constitutional amendment (Amendment 2) prohibiting official protection from discrimination on the basis of sexual orientation violated the Fourteenth Amendment's Equal Protection Clause. Using a rational basis standard of review, the most deferential test, the Court invalidated Amendment 2 which (1) contained a classification of "homosexuals," and (2) withdrew from homosexuals, but no others, legal protection from discrimination and prohibited reinstatement of these laws and policies. *See id.* at 627.

The primary rationale advanced by the State for Amendment 2, adverted to in the opinion, was respect for other citizens' freedom of association, and, in particular, the liberties of landlords or employers who have personal or religious objections to homosexuality. *Id.* at 635. In striking down Amendment 2, the Court stated, that "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* at 633. The inequality the Court detected was that homosexuals were singled out by Amendment 2 and accorded less protection of the law solely by virtue of their membership in the class. *Id.* at 635. Although the Court utilized a rational basis standard for its analysis, Amendment 2 still failed this most deferential standard because the Court found the amendment advanced no legitimate government interest. *Id.*

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10 Section B of this part III examines the application of the rational basis review to a city ordinance where the justifications for the classification it contained did not justify singling out one group for different treatment, thus rendering the classification irrational and unconstitutional as applied.

Thus, the *Romer* Court concluded Amendment 2 classified homosexuals not to further a proper legislative end, but to make them unequal to everyone else. *Id.*

Interestingly, Petitioner, the State of Colorado, offered other justifications for Amendment 2 similar to those offered by the State here.[11] In *Romer*, the State argued the "legitimate governmental interests" of Amendment 2 were the promotion of traditional moral norms and family values. *See* Petitioner's Brief at 45-47, *Romer* (1995 WL 310026). Specifically, the State posited the amendment fostered "family privacy and the ability to convey values to their children," by disallowing the "implicit endorsement of homosexuality **[41 S.W. 3d at 354]** fostered by laws granting special protections [that] could undermine the efforts of some parents to teach traditional moral values," and deterred factionalism within the state by "maximiz[ing] individual liberty, including the preservation of traditional norms." *Id.*

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11 In note 15, the majority refused to accept the fact that the State of Colorado *did* in fact make those arguments in its brief. Even though the arguments are not set out in the opinion, a reader may access them by going through the WestLaw reference in the *Romer* opinion, which brings up the briefs containing the rejected arguments. 517 U.S. at 621.

Far from accepting these justifications as legitimate, the Court apparently did not find they even merited review in the opinion. Thus, the Court, *sub silentio*, rejected the "implementation of traditional notions of morality" justification deemed sufficient in *Bowers v. Hardwick*, 478 U.S. at 196, and *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), both of which are relied upon by the State here.[12] In *Romer*, the

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[12] Justice Scalia's dissent in *Romer* concedes as much. He notes, that in "plac[ing] the prestige of [the Supreme Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias," the Court has essentially *sub silentio* overruled *Bowers*. 517 U.S. at 636-37. I agree with this characterization of *Romer*, and further note the rational basis analysis employed by the *Romer* Court may be more exacting than that employed by the Court in *Bowers*. The concurring opinion by Justice Fowler fails to appreciate the difference in the rational basis test as applied in a *Bowers* due process analysis versus a *Romer* equal protection analysis.

Although both *Bowers* and *Romer* applied the rational basis analysis to the state action in question, there is, nevertheless, a difference in the analysis of rational basis review under the Due Process Clause and under the Equal Protection Clause. These two clauses perform quite different functions. In its substantive dimension, the Due Process Clause protects a range of basic rights; it does not speak to the constitutionality of classifications. The Equal Protection Clause operates as a functional complement to the Due Process Clause, addressing a different set of questions. The Due Process Clause has frequently been understood as an effort to restrict short-term or shortsighted deviations from widely held social norms; it has an important backward looking dimension. For purposes of due process, the baseline for inquiry has tended to be the common law, Anglo American practice, or the status quo. The Due Process Clause is, therefore, closely associated with the view that the role of the Supreme Court is to limit dramatic and insufficiently reasoned change, to protect tradition and to bring a more balanced and disinterested perspective to legislation. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1171 (1988). Thus, in *Bowers*, the Court declined to find, as respondent requested, a fundamental right to engage in

Supreme Court focused, instead, upon the animus apparent from a provision that drew a classification "for the purpose of disadvantaging the group burdened by the law." 517 U.S. at 633. Because Amendment 2 drew such a classification, and then proceeded to disadvantage homosexuals because **[41 S.W. 3d at 378]** of their membership in the class, the amendment violated the equal protection of the law guaranteed by the Fourteenth Amendment.

The statute at issue here, much like Amendment 2, draws a classification for the purpose of disadvantaging the group burdened by the law. In fact, Justice Scalia, in his dissent to *Romer* readily agreed that, "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.* at 641. I agree with Justice

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homosexual sodomy because sodomy was not a fundamental liberty that was deeply rooted in this Nation's history and tradition. *Bowers*, 478 U.S. at 192.

The Equal Protection Clause, on the other hand, has served an entirely different set of purposes from the Due Process Clause. That clause is emphatically not an effort to protect traditionally held values against novel or short-term deviations. The clause is not backward looking at all; it was consciously designed to eliminate practices that existed at the time of ratification and that were expected to endure. The function of the Equal Protection Clause is to protect disadvantaged groups against the effects of past and present discrimination by political majorities. It is not rooted in common law or status quo baselines or in Anglo-American conventions. The baseline is instead a principle of equality that operates as a criticism of existing practice. The clause does not safeguard traditions; it protects against traditions, however long standing and deeply rooted. Sunstein, *supra* at 1174. Thus, Justice Fowler's conclusion, that rational basis review under the Due Process Clause is the same as rational basis review under the Equal Protection Clause ignores the important distinction between the functions of the two clauses and how that distinction shapes review under each clause using the rational basis standard.

Scalia that the statute at issue here, by proscribing "deviate sexual intercourse" only when engaged in with members of one's own sex, does discriminate against homosexuals. However, following *Romer*, I view the justifications proffered by the State, enforcement of traditional norms of morality and family values, as nothing more than politically-charged, thinly-veiled, animus-driven clichés.[13] Section 21.06 is, like Amendment 2, a status-based enactment divorced from any factual context from which one can discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. *Id.* at 635. Although a state's police powers are broad and comprehensive, the constitution, both state and federal, "forbids its exercise when the result would be the destruction of the rights, guarantees, privileges, and

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13 I am not unmindful of the sensibilities of many persons who are deeply persuaded that homosexual sodomy is evil and should be prohibited. That is not the issue here. Rather, the federal equal protection issue before this court, which I believe should be answered in the negative, is whether the Federal Constitution permits discriminatory recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members remain entirely free to employ theological teaching, moral persuasion, parental advice, psychological and psychiatric counseling, and other noncoercive means to condemn the practice of homosexual sodomy. *People v. Onofre*, 415 N.E.2d 936, 941 n.3 (N.Y. 1980). Alternatively, if the legislature wishes to abolish what it views as immoral behavior, it is free to do so, provided that it does not single out a class of people for the prohibition, while freely permitting other classes to engage in the same behavior, thereby, again, running afoul of the federal Equal Protection Clause. But the law regarding the use of the criminal law to implement biases is clear: "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *City of Cleburne*, 473 U.S. at 448 (using rational relationship test to invalidate zoning ordinance requiring a special use permit for home for the mentally retarded where no special permit required for other similar multiple dwelling facilities).

restraints excepted from the powers of government by the Bill of Rights." *Fazekas v. University of Houston*, 565 S.W.2d 299, 305 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (citing *Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007 (1934)). Thus, stripped of its asserted justifications, the classification drawn in 21.06 is arbitrary and irrational, and fails the rational basis test.

Regarding appellants' issue on sexual orientation discrimination aspect of 21.06, the majority, *inter alia*, concludes there is no fundamental right to engage in sodomy, and homosexuals do not constitute a suspect class. These two conclusions are irrelevant here because appellants do not raise these arguments, and the first conclusion implicates *Bowers v. Hardwick* where equal protection was not argued or addressed.

B.

City of Cleburne

Legislation containing a classification challenged under the Equal Protection **[41 S.W. 3d at 379]** Clause must, in order to withstand rational basis review, be rationally related to a legitimate governmental purpose. *City of Cleburne*, 473 U.S. at 446. The State may not rely, however, on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Zobel*, 457 U.S. at 61-63. Objectives such as a bare desire to harm a politically unpopular group are not legitimate State interests. *City of Cleburne*, 473 U.S. at 447.

In *City of Cleburne*, the Court struck down a city zoning ordinance requiring a special use permit for a home for the mentally retarded, but exempting from such a permit apartment houses, fraternity houses, apartment hotels, hospitals, private

clubs and other specified uses. *Id.* Plainly stated, the equal protection issue there presented was: "May the city require the permit for this facility when other care and multiple dwelling facilities are freely permitted?" *Id.* at 448. The Federal District Court had found, and the Court of Appeals and Supreme Court repeated the obvious fact that if the potential residents of the home for the mentally retarded were not in fact so afflicted, and the home was the same in all other respects, its use would be authorized under the zoning ordinance. *Id.* at 449.

The city presented several bases supporting the ordinance: fear and negative attitudes by residents living near the facility; location of the home in a five hundred year flood plain; the size of the home and the number of people who would occupy it. The *City of Cleburne* Court demonstrated how each factor presented by the city made no sense in light of how the city treated other groups similarly situated in relevant respects. *Id.* at 448-450. Because none of the asserted bases rationally justified singling out a home for the retarded for the special use permit, while imposing no such restrictions on other uses freely permitted in the neighborhood, the Supreme Court concluded:

> [R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the [home] and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

Id. at 450.

Applying the *City of Cleburne* rational basis review here, because the State's grounds purporting to justify 21.06 do

not rationally justify criminalizing same sex sodomy while imposing no such burden on others engaging in acts defined as deviate sexual intercourse, the classification is arbitrary and irrational and driven by prejudice. It makes no sense for the State to contend that morals are preserved by criminalizing homosexual sodomy while supporting sodomy by heterosexual couples, including unmarried persons. The State simply may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Zobel*, 457 U.S. at 61-63. Where, as here, the State interest of preserving morality is irrational in light of authorization of the same immoral acts by others, the statute fails rational basis review under the Equal Protection Clause and should be held in violation of the United States Constitution. *Heller v. Doe by Doe*, 509 U.S. 312, 324 (1993) (stating a statutory classification fails rational basis review when it rests on grounds wholly irrelevant to achievement of the state's objective).

[41 S.W. 3d at 380]

The majority's discussion of the historical definitions of sodomy, which includes a reference to a seventeenth century law of the Massachusetts Bay Colony, suggests that homosexuals have been subjected to a tradition of disfavor. In his concurring opinion in *City of Cleburne*, Justice Stevens, joined by Chief Justice Burger, distanced himself from the tiered analysis of equal protection claims because, he believed, the rational basis test is suitable for all such inquiries. 473 U.S. at 452. In every equal protection case, he wrote, we have to ask certain basic questions: What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? *Id.* at 453. In a footnote to this question, Justice Stevens stated the following:

> The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is made. *Id.* at n.6.

Because the State has not shown a valid state interest for 21.06 that is rationally served by proscribing sodomy only when performed by homosexuals, the unavoidable conclusion is that the statute was merely a continuation of the stereotyped reaction to a traditionally disfavored group. By its unquestioning acceptance of the State's justification for the statute, the majority has overlooked the illegitimate stereotyping lying at the core of 21.06.

C.

Judge Norris, concurring in *Watkins v. U.S. Army*, 875 F.2d 699, 720 (9th Cir. 1989), captured, in my view, the core rationale underlying the Equal Protection Clause of the Fourteenth Amendment. He wrote that the equal protection doctrine does not prevent the majority from enacting laws based

on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. *Id.* Indeed, the equal protection doctrine plays an important role in perfecting, rather than frustrating, the democratic process. The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression. *Id.*

Therefore, I would hold section 21.06 violates the Equal Protection Clause based on appellants' contentions that it discriminates based on both gender and sexual orientation. Accordingly, I would sustain appellants' first point of error challenging 21.06 on federal equal protection grounds, as applied and on its face.

IV.

Section 21.06 and The Texas Equal Rights Amendment

Appellants also challenge 21.06 contending it violates Article I, §3a of the Texas Constitution in that it proscribes otherwise lawful behavior solely on the basis of the sex of the participants. That provision of the Texas Bill of Rights provides as follows:

> Equality under the law shall not be denied or abridged because of sex, race, **[41 S.W. 3d at 381]** color, creed, or national origin. This amendment is self-operative.

In my opinion, there are two standards by which review of section 21.06 may be made 24 in the face of a challenge

under the Texas ERA. The first is a *per se* rule based on the mandate of Article I, §29 of the Texas Bill of Rights, and the second is strict scrutiny under the guidance of *In re McLean*, 725 S.W.2d 696 (Tex. 1987).

A. *Per Se Rule*

Article I, §29 of the Texas Bill of Rights states the following rule regarding the power of the state government to usurp any of the rights contained in Article I of the Texas Constitution:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Section 29 has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-149 (Tex. 1995). When a law conflicts with rights guaranteed by Article I, the constitution declares that such acts are void because the Bill of Rights is a limit on State power. *Id.* at 149. Indeed, the Bill of Rights consists of express limitations of power on the legislature, executive officers, and the judiciary. *Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 90 (Tex. 1997) (citing *Travelers Ins. Co. v. Marshall*, 76 S.W.2d 1007 (Tex. 1934)). The framers of the Texas Constitution articulated what they intended to be the means of remedying a constitutional

violation: a law contrary to a constitutional provision is void. *Bouillion*, 896 S.W.2d at 149.

Thus, while the State, in the exercise of its police powers, may enact legislation reasonably tending to promote the health, comfort or welfare of the public, the extent of this power is limited and must be exercised in conformance with the limitations prescribed by the constitution. *Faulk v. Buena Vista Burial Park Ass'n*, 152 S.W.2d 891-95 (Tex. Civ. App.—El Paso 1941, no writ); *see also Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (McCormick, P.J., concurring) (characterizing dissent's approach to "privacy expectation" analysis as coming "perilously close to subjecting our constitutional rights too closely to majoritarian political processes and temporary passions of the moment, which is inconsistent with the idea underlying the Bill of Rights.").

Therefore, when the equality guaranteed by the Texas ERA is viewed through the prism of the Texas "Inviolability Clause,"[14] it becomes clear that section 21.06, as a non-gender neutral classification created by the legislature in violation of Article I, §3a, is void.[15]

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[14] Article I, §29 excepts everything in the bill of rights out of the general powers of government and states such rights included therein are to remain inviolate, thus placing these rights beyond the power of the state government to usurp. TEX. CONST. Art. I, § 29 interp. commentary (Vernon 1997).

[15] The majority never really addresses the Texas ERA, or the companion Inviolability Clause, in its analysis of appellants' challenge to 21.06 on the basis of gender discrimination under the Texas Constitution, even though Rule 47.1 requires that opinions from this Court "address[] every issue raised and necessary t final disposition of the appeal." TEX. R. APP. P. 47.1. Nevertheless, by its decision today the majority renders meaningless the action of the people of Texas in placing the ERA in the state

[41 S.W. 3d at 382]

B. *Strict Scrutiny Under In re McLean*

Before examining the precise manner in which the *McLean* court analyzed a statute that discriminated on the basis of sex, it is informative to review what that court had to say about the meaning of the Texas ERA.

The *McLean* court declined to give the Texas ERA an interpretation identical to that given state and federal due process and equal guarantees. 725 S.W.2d at 697. Both the United States Constitution and the Texas Constitution had due process and equal protection guarantees before the ERA was adopted in Texas in 1972. *Id.* If the due process and equal protection provisions and the ERA are given identical interpretations, then the 1972 amendment, adopted by a four to one margin by Texas voters, was an exercise in futility. *Id.* Thus, the *McLean* court concluded the Equal Rights Amendment is more extensive and provides more specific protection than both the United States and Texas due process and equal protection guarantees. *Id.* at 698. The *McLean* court did not, however, adopt a *per se* standard,[16] but instead concluded the Texas ERA elevated sex to a suspect class, thus subjecting any gender discrimination to strict scrutiny, placing the burden on the proponent of the

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constitution, engaging in nothing less than the gratuitous nullification of an act of the people of Texas and totally disregarding their expressed constitutional will. *See Barber v. Colorado Indep.Sch.Dist.*, 901 S.W.2d 447, 455 (Tex. 1995) (Gammage, J., dissenting to majority's refusal to intervene and apply Texas ERA to a class action challenging high school's hair length and earring restrictions under the ERA based on gender discrimination).

16 There is no reference in *McLean* to Article I, §29.

discriminatory provision to demonstrate a compelling interest, *and* that there is no other manner to protect the state's compelling interest. *Id.* (citing *Mercer v. Board of Trust., North Forest Indep. Sch. Dist.*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (holding any classification based on sex is suspect classification; thus any law or regulation classifying persons for different treatment on basis of their sex is subject to strictest judicial scrutiny)). The Austin Court of Appeals has also concluded the Equal Rights Amendment elevates sex to a suspect class, thereby invoking strict scrutiny review when a law differentiates on the basis of gender. *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ).

Neither the State nor the majority have applied the strict scrutiny mandated by *McLean* and *Mercer*. Nevertheless, that standard must be applied. *McLean* established a two step process for examining a statute challenged as a violation of the ERA. The first step is to determine whether equality under the law has been denied. 725 S.W.2d at 697. That first inquiry is relatively simple. The denial of equality here was under the law because appellants were prosecuted under 21.06 of the Texas Penal Code. In *McLean,* the court held that because disparate treatment of an illegitimate child's father and mother was required by a statute in the Texas Family Code, the denial of equality was under the law. *Id.*

The second inquiry is whether equality was denied because of a person's membership in a protected class of sex, race, color, creed, or national origin. *Id.* As I have discussed above in connection with the analysis of appellants' federal equal protection challenge to 21.06, it is manifest on the face of that statute it is the gender of the particular actors that serves as the trigger for 21.06's prohibitions, so that discussion need not

be repeated here. Thus, addressing the second part of the *McLean* **[41 S.W. 3d at 383]** test, the focus is on whether the discrimination in 21.06 is prohibited by the ERA. *Id.* Sex-based discrimination is allowed to co-exist with the ERA only when the proponent of the discrimination can prove there is no other manner to protect the state's compelling interest. *Id.* Surprisingly, counsel for the State conceded at oral argument that he could not "even see how he could begin to frame an argument that there was a compelling State interest," much less demonstrate that interest for this Court. The State did offer, however, what it characterized as *legitimate* purposes for the statute: enforcement of principles of morality and promotion of family values.

It is simply not enough for the State to say it has an important interest furthered by the discriminatory law. *Id.* at 698. Even the loftiest goal does not justify sex-based discrimination in light of the clear constitutional prohibition contained in the Texas ERA. *Id.* Strict scrutiny is not satisfied until the State has met a two part test: articulation of a compelling state interest, and a showing that there is no other manner tc protect the state's compelling interest. *Id.* Thus, even accepting the morality and family values bases supporting the discrimination as compelling state interests, there is no showing here that there is no other manner of protecting morality and family values other than prosecuting same sex sodomy. It would appear that the state's goal of protecting these interests was originally achieved on a non-discriminatory basis when the prohibition of sodomy applied to all persons. *See* n.8, *supra*. There are other avenues for achieving the State's objectives without resorting to 21.06 as pointed out by the court in *Onofre*. *See* n.13, *supra*. It is manifestly illogical to suggest that sodomy, when performed by heterosexuals promotes morality

and family values, and that the same acts when performed by same sex couples, denigrates morality and family values.

As noted above, implicitly rejecting "morality" and "family values" as justifications for Colorado's discriminatory constitutional amendment, the United States Supreme Court struck down the amendment under a rational basis standard. *See* n.12, *supra*. Logic dictates that if the promotion of morality norms and family values as rationalizations for state sponsored discrimination will not pass a rational basis standard of review, such contentions would wilt in the face of strict scrutiny mandated by *McLean*. I conclude, therefore, that because the State has not shown there are no alternate means to protect the State's asserted interests of family values and morality other than through the gender-based discrimination in 21.06, the statute violates Article I, §3a of the Texas Constitution and is, therefore, void. *See* TEX. CONST. Art. I, § 29.

Accordingly, I would sustain appellant's point of error two challenging 21.06 under the Texas ERA.

V.
Conclusion

Analyzed correctly under binding Supreme Court precedent, Texas Penal Code section 21.06 is in violation of the Equal Protection Clause of the Federal Constitution because it is neither rationally related to the legitimate State objective presented for its support, nor viable under heightened scrutiny because the State failed to articulate a compelling interest served by the gender discrimination exhibited by 21.06 on its face and as applied. Further, under the Texas Bill of Rights, because the gender discrimination in 21.06 contravenes the

Equal Rights Amendment, it is automatically void without regard to any justification.

[41 S.W. 3d at 384]

The holding here that 21.06 is unconstitutional is not tantamount to a conclusion that there is nothing wrong with the prohibited conduct. The majority correctly states that mere disagreement with the Legislature over whether the conduct proscribed by 21.06 is or is not a bad deed is not a basis for overturning a statute. This statement, however, is incomplete because it ignores the duty a judge has when confronted by a statute in conflict with the constitution.

> The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it. In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will [expressed in the constitution]. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law.

Ex parte Rodriguez, 39 Tex. 705, 751 (1873).

The Texas Constitution does not protect morality; it does, however, guarantee equality to all persons under the law. TEX. CONST. art. I, § 3a. My personal views on the conduct involved here are irrelevant to the outcome that I believe is required. The foregoing is my duty in the preparation of opinions because Cannon 3B(5) of the Texas Code of Judicial Conduct requires a judge to "perform judicial duties without bias or prejudice." Thus, the result reached in this dissent is purely a function of the application of the Texas and Federal Constitutions to section 21.06, and nothing more. Accordingly, I respectfully dissent.

/s/ John S. Anderson
Justice

Dissenting Opinion filed March 15, 2001.
En Banc.
Publish—TEX. R. APP. P. 47.3(b).

Appendix D

Reversed and Rendered and Majority and Dissenting Opinions filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00109-CR
NO. 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 98-48530 and 98-48531

MAJORITY OPINION

Appellants, John Geddes Lawrence (Lawrence) and Tyron Garner (Garner), were charged with violating section 21.06 of the Texas Penal Code. Appellants pleaded *nolo contendere* and were fined $200 each. Lawrence and Garner bring this appeal, arguing their convictions should be reversed on both federal and state constitutional grounds. We reverse the judgments of the trial court, dismiss the complaints, and render judgments of acquittal.

I.
Factual and Procedural Background

Responding to a report of an armed intruder, police officers entered Lawrence's home, and found Lawrence and Garner engaged in sodomy. Because both participants were of the same sex, the officers arrested the two men for violating section 21.06 of the Texas Penal Code. Initially, Lawrence and Garner were charged by complaints in Harris County Justice Court and were convicted of engaging in homosexual conduct, and each was fined $125. They immediately appealed their case to the Harris County Criminal Court at Law, Number 10, a court of record, where the court denied their motions to quash their complaints on due process and equal protection grounds. After accepting their plea of *nolo contendere*, the trial court fined them $200 each.

On appeal, Lawrence and Garner challenge the constitutionality of section 21.06 in four issues: (1) whether the statute violates the right to federal constitutional equal protection as applied and on its face; (2) whether the statute violates the right to state constitutional equal protection as applied and on its face; (3) whether the statute violates the

appellants' right to privacy under the Texas Constitution, and (4) whether the statute violates the appellants' right to privacy under the United States Constitution.

II.
Scope of Review

We have considered all of appellants' points of error challenging section 21.06 and have concluded that their argument under the Texas Equal Rights Amendment is dispositive of this appeal. Therefore, we will not address appellants' federal right to privacy arguments. *See* TEX. R. APP. P. 47.1 (opinion must be as brief as practicable but address every issue necessary to final disposition of appeal); *see also Davenport v. Garcia*, 834 S.W.2d 4, 14 n.28 (Tex. 1992) (noting that where the court finds a statute to be unconstitutional under the Texas Constitution, consideration of the federal constitutional question is unnecessary). Moreover, because the Texas Equal Rights Amendment is more extensive and provides more specific protection than the United States equal protection guarantee, we will not address appellants' federal equal protection argument. *See In Re Unnamed Baby McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Finally, because, as noted in part III below, another Texas appellate court has addressed the conflict between section 21.06 and the right of privacy in the Texas Bill of Rights, we will not reexamine that issue.

III.
Texas' Equal Protection

We begin by noting another Texas appellate court has twice declared this statute unconstitutional. *See City of Dallas v. England*, 846 S.W.2d 957 (Tex. App.—Austin 1993, writ

dism'd w.o.j.); *see also State v. Morales*, 826 S.W.2d 201 (Tex. App.—Austin 1992, *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). The *Morales* court found the statute violated the appellees' right of privacy guaranteed by the Texas Constitution, and that court subsequently applied the holding in *Morales* to again invalidate the statute. *See England*, 846 S.W.2d at 958.[1] However, the Texas Supreme Court may have significantly undermined the privacy right announced in *Morales* and *England*. Three years after *England*, the Texas Supreme Court, borrowing heavily from *Bowers v. Hardwick*, 478 U.S. 186 (1986), denied the existence of an asserted privacy right by insisting that the appellant's conduct was "not a right implicit in the concept of liberty in Texas or deeply rooted in this state's history and tradition." *See Henry v. City of Sherman*, 928 S.W.2d 464, 470 (1996). Although the Supreme Court never mentioned *Morales* or *England*, its holding clearly implicated the analysis in both cases. For this reason, we limit our analysis to the Texas Equal Rights Amendment.

A. The Arguments

The Texas Equal Rights Amendment (ERA) provides that, "[e]quality under the law shall not be denied or abridged

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[1]Other states that have recently struck down their own homosexual or heterosexual sodomy statutes have done so for the same reason given by the *Morales* court, the right to privacy as protected under each state constitution. *See Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App.–Nashville 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (striking statute on both privacy and equal protection grounds). We look to sibling state jurisprudence as persuasive, but not controlling, authority in our constitutional analysis following the dictates of *Autran v. State*, 887 S.W.2d 31, 37 n.6 (Tex. Crom. App. 1994).

because of sex, race, color, creed, or national origin." TEX. CONST. Art. I, § 3a. Lawrence and Garner assert that section 21.06 of the Penal Code violates the Texas ERA because it proscribes otherwise lawful behavior solely on the basis of the sex of the participants. The challenged statute, bearing the heading "Homosexual Conduct," states: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. [and] (b) An offense under this statute is a Class C misdemeanor." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). "Deviate sexual intercourse" is defined as: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object. *See* TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).[2]

Appellants argue this statute violates the Texas ERA because the same behavior, sodomy, is legal when performed by members of the opposite sex, but illegal when performed by members of the same sex. Thus, the statute criminalizes the conduct solely on the basis of the sex of the participants, thereby violating the Texas ERA prohibition against denying equality under the law on the basis of sex. *See* TEX. CONST. Art. I, § 3a. The State counters this argument first by arguing the State has a legitimate interest in regulating this behavior, and second, that the statute does not discriminate on the basis of gender because the statute is applicable to both men and women.

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[2] In this opinion, we refer to "deviate sexual intercourse" as sodomy. "Sodomy" while variously defined in state criminal statutes, is generally oral or anal copulation between humans. *See* BLACK'S LAW DICTIONARY 1391 (6th ed. 1990).

B. Standard of Review

When a court reviews the constitutionality of a statute, it presumes that the statute is valid. *See HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994). If interests other than fundamental rights or a suspect classification are affected, the classification must be rationally related to a legitimate state interest. *See id.* However, "our reading of the Equal Rights Amendment elevates sex to a suspect classification. Sex is clearly listed in the amendment along with other classifications afforded maximum constitutional protection." *McLean*, 725 S.W.2d at 698. Therefore, any classification based upon sex is a suspect classification, and any law or regulation that classifies persons for different treatment on the basis of their sex is subject to strict judicial scrutiny. *See Mercer v. Board of Trustees, North Forest Indep. Sch. Dist.*, 538 S.W.2d 201, 206 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). Thus, "any such classification must fall unless the party defending it can show that it is required by (1) physical characteristics, (2) other constitutionally protected rights such as the right of privacy, or (3) other 'compelling reasons.'" *Id.*[3]

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[3] We do not address the first *Mercer* prong because, here, the State never offered any evidence of differing specific physical characteristics of females and males that would serve to vindicate the challenged classification. *See Mercer*, 538 S.W.2d at 206. Neither do we address the second inasmuch as the State does not contend that enforcement of the protection afforded by the ERA would conflict with other fundamental constitutional protections. Therefore, our analysis is limited to the third prong, requiring the State to demonstrate "compelling reasons" for its sex-based classification. *See id.*

C. Analysis

"The first step in a case invoking [the Texas ERA] is to determine whether equality under the law has been denied." *McLean*, 725 S.W.2d at 697.[4] Our next inquiry is whether equality was denied *because of* a person's membership in a protected class of sex, race, color, creed, or national origin. *See id.* Thus, our task becomes an examination of the relevant provisions of the penal code to determine whether Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex.

Here, the first inquiry is relatively simple. The denial of equality is clearly "under the law" because Lawrence and Garner were prosecuted pursuant to section 21.06 of the Texas Penal Code. *See McLean*, 725 S.W.2d at 697 (noting disparate treatment of illegitimate child's father and mother was required by statute contained in Texas' Family Code, thus the denial of equality was "under the law").

The second inquiry, however, is more complex. As presently constituted, the penal code proscribes sodomy only when performed between individuals of the same sex. *See* TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). This, however, was not always the case. Until 1974, the penal code prohibited oral or anal copulation "with another human being."[5] Thus, the

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[4] *McLean* is the leading case addressing the ERA. The dissent fails to advert to the analysis used there by the Supreme Court. However, *McLean* does not address, as the dissent does, the intent of the ratifiers of the ERA.

[5] Article 524 provided as follows:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.

Acts 1943, 48th Leg., ch. 112, § 1, *repealed by* Acts 1973, 63rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

statute prohibited all acts of sodomy, whether performed by members of the opposite or the same sex. *See Pruett v. State*, 463 S.W.2d 191, 193 (Tex. Crim. App. 1970). In 1974, a new penal code was enacted, and as part of a comprehensive reform, many laws concerning sexual behavior were either revised or dropped from the code altogether. *See Baker v. Wade*, 553 F.Supp.1121, 1151 app. A (N.D. Texas 1982). Thus, prohibitions against adultery, fornication, and seduction on promise of marriage no longer existed. *See id.* More importantly for our purposes, although sodomy performed by members of the same sex continued to be proscribed, the same act performed by members of the opposite sex became, for the first time in 114 years, legal. *See id.* at 1148-50.

Therefore, in 1973[6], the Texas Legislature created two standards, demarcated by the sex of the actors: oral and anal intercourse when performed by a man and a woman would henceforth be legal, but oral and anal intercourse performed by two men or two women would remain illegal. Thus, after 1974, the distinction between legal and illegal conduct was not the

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[6] Convening in 1973, the 63rd Legislature, passed the revised Penal Code which was enacted in 1974. Acts 1973, 63rd Leg., ch. 399, §1, 1973 Tex. Gen. Laws 917.

act, but rather the sex of one of the participants. Accordingly, we must respond to our second inquiry in the affirmative: Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex.

Having reached the conclusion that section 21.06 discriminates on the basis of gender, we next focus on whether the discrimination is prohibited by the ERA. *See McLean*, 725 S.W.2d at 697. Because not all gender-based distinctions are prohibited by the ERA, a *per se* standard invalidating all such distinctions is inappropriate. *See id.* at 698. Rather, the standard is one recognizing the ERA does not yield except to compelling state interests. *See id.* Thus, sex-based discrimination is allowed only when the proponent of the discrimination can prove there is no other manner to protect the state's compelling interest. *See id.* Surprisingly, counsel for the State conceded at oral argument that he could not "even see how he could begin to frame an argument that there was a compelling State interest," much less demonstrate that interest for this Court. The State did offer, however, what it characterized as *legitimate* purposes for the statute: enforcement of principles of morality and promotion of family values.[7] Moreover, the State asserts the strict scrutiny we have applied is unwarranted because the statute does not discriminate on the basis of gender since it applies to men and women equally.

The United States Supreme Court discussed the logic of an argument analogous to the State's argument here in *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817,18 L.Ed.2d 1010 (1967). There, the State of Virginia argued that Virginia's

[7] It is not enough for the State to say it has an important interest furthered by the discriminatory law because even the loftiest goal does not justify sex-based discrimination in light of the ERA's clear prohibition. *See McLean*, 725 S.W.2d at 698.

miscegenation statutes do not constitute invidious racial discrimination because the statutes apply equally to whites and blacks. *See Loving*, 388 U.S. at 8. The miscegenation statutes, the State contended, penalized both whites who intermarried and blacks who intermarried equally; therefore, the 'equal application' of the statutes rendered them acceptable under the Fourteenth Amendment using a rational basis standard. *See id.* Rejecting this sophistry, the Court responded that the mere equal application of a statute containing racial classifications does not remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations. *See id.* at 8. By using the race of an individual as the sole determinant of the criminality of his conduct the State created and perpetuated an invidious racial classification in violation of the Fourteenth Amendment. *See id.* at 11. Accordingly, the Court reaffirmed the propriety of strict scrutiny and struck the Virginia statutes as unconstitutional. *See id.* at 12.

We also reject the equal application argument offered here. Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, does not salvage the discriminatory classification contained in this statute. The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual is the sole determinant of the criminality of the conduct. Applying strict scrutiny to this sex-based classification, and in the absence of any showing by the State of a compelling interest justifying the sex- based discrimination, we hold that section 21.06 of the Texas Penal

Code violates the Texas Equal Rights Amendment's guarantee of equality under the law.[8]

Federal precedent is not controlling when courts consider a case under the Texas Equal Rights Amendment. *See*

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[8] The dissent disagrees with this holding; therefore, we will briefly respond. First, the dissent contends the history of the Texas ERA "suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct." The dissent's reliance on the intent of the ratifiers is misguided for one simple reason: "homosexual conduct" was not criminalized at the time of the ERA's ratification in 1972 because in 1972 the prohibition against sodomy applied to all individuals, regardless of their sex. Therefore, the equality mandated by the ERA was not contravened by the then-existing sodomy statute, and whether today's reading of the ERA was foreseen and rejected by Texas voters at the time of its ratification is raw conjecture. *Cf. Meraz v. State*, 785 S.W.2d 146, 153 (Tex. Crim. App. 1990) (noting the effect of voter approval of a 1978 amendment to Article V, section 6 of the Texas Constitution confirmed authority of court of appeals to determine if a jury finding is against the great weight and preponderance of the evidence, *whether the public knew it or not*). Second, the Texas Supreme Court has repeatedly explained that when interpreting the Constitution, "[w]e seek its meaning with the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time." *Davenport*, 834 S.W.2d at 19. For that reason, when interpreting our state Constitution, we rely heavily on its literal texts, and are to give effect to its plain language. *See The Republican Party of Texas v. Dietz*, 940 S.W.2d 86, 89 (1997). Today, we interpret the ERA's plain language to strike down the codified discrimination explicit in the penal code's proscription of "deviate sexual intercourse," the "sex act" at issue, based solely upon the gender of one's sexual partner. Finally, we believe it is not the judiciary's prerogative to condone or condemn a particular lifestyle and the behaviors associated therewith upon the basis of our moral belief. Moreover, it does not follow that simply because the Texas Legislature has enacted as law what may be a moral choice of the majority, the courts are, thereafter, bound to simply acquiesce. *See Gryczan*, 942 P.2d at 125. Our Constitution does *not* protect morality; it does, however, guarantee equality to all persons under the law. *See* TEX. CONST. Art. I, § 3a.

McLean, 725 S.W.2d at 697. Indeed, it is fundamental that state courts be left free and unfettered by the United States Supreme Court in interpreting their state Constitutions. *See Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940). Our decision is based on adequate and independent state grounds, and any federal cases are used for guidance only and do not themselves compel the result this court has reached. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). As set forth above, our holding regarding the unconstitutionality of Penal Code section 21.06 is based solely on the Texas Equal Rights Amendment.[9]

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[9] The dissent relies upon the opinion in *Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985) as precedent for its argument that section 21.06 does not constitute sex-based discrimination. We disagree that *Boutwell* affects in any way our disposition of this appeal for three reasons. First, *Boutwell* was concerned not with the statute at issue here, but rather with another, repealed, statute containing a sex-based classification. That statute related to the defense of promiscuity which was available only to those defendants who sexually assaulted a child of the opposite sex. However, because the Legislature repealed the statute at issue in *Boutwell* and the Court of Criminal Appeals has since disavowed *Boutwell*, we do not consider it to have significant precedential value today. *See Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992). Second, *Boutwell* mentioned section 21.06 in dicta as support for its rejection of Boutwell's argument that he was denied equal protection of the law by the unavailability of the promiscuity defense because he had assaulted a male child. The majority merely mentioned section 21.06 to demonstrate that the State had made homosexual conduct a crime, thus Boutwell's "sex act" was not a protected activity under the ERA. While this observation is interesting, it is of no moment here because the question at bar today is not whether the ERA protects homosexual conduct, but whether the criminalization of sodomy by same sex partners only can withstand scrutiny under the ERA. As discussed more fully above, we hold it c an not. Third, in *Boutwell*, Judge Clinton effectively neutralized any value the opinion might have had regarding the constitutionality of section 21.06 by indicating that any constitutional infirmities infecting that statute were not considered by the court because they were not advanced by Boutwell in his appeal. *See id.* This is not the case here. Appellants Lawrence and Garner have effectively advanced both logic and authority for their constitutional attack on section 21.06. Based on

We reverse the judgments of the trial court, dismiss the complaints, and render judgments of acquittal.

/s/ John S. Anderson
Justice

Judgment rendered and Majority and Dissenting Opinions filed June 8, 2000.
Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.
Publish — TEX. R. APP. P. 47.3(b).

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these core distinctions, we will not, as the dissent has, apply the analysis in *Boutwell*.

Reversed and Rendered and Majority and Dissenting Opinions filed June 8, 2000.

In The

Fourteenth Court of Appeals

NOS. 14-99-00109-CR & 14-99-00111-CR

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause No. 98-48530

DISSENTING OPINION

Because I do not believe the people of this state intended to decriminalize homosexual conduct when they approved the Texas Equal Rights Amendment, I respectfully dissent.[1]

The State of Texas contends that Section 21.06 of the Penal Code does not discriminate on the basis of gender because it applies equally to men and women, i.e., it is just as unlawful for men to engage in homosexual conduct as it is for women. The majority rejects the State's contention because a similar argument was rejected by the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967).

In *Loving*, the issue before the court was the constitutionality of Virginia's miscegenation statute which imposed severe criminal penalties for interracial marriage. The State of Virginia argued the statute did not discriminate on the basis of race because it applied with equal force to both whites and blacks, i.e., it was just as unlawful for a white person to marry a black person as it was for a black person to marry a white person. The court rejected the argument because it concluded the Equal Protection Clause of the Fourteenth Amendment was specifically intended to eliminate the type of racial discrimination inherent in Virginia's miscegenation statute. However, because the Texas Equal Rights Amendment was never intended to decriminalize homosexual conduct, *Loving* is distinguishable.

The Fourteenth Amendment was part of a series of proclamations, statutes, and amendments designed to eradicate slavery and any collateral discrimination incident thereto. In

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[1] The amendment provides: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." TEX. CONST. art. I, § 3a.

1863, while the outcome of the civil war remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after General Lee surrendered his forces at Appomattox, the Thirteenth Amendment was adopted; it declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." But while the abolition of slavery had been constitutionally mandated, former slaves were still subjected to serious abuses. Individual southern states began enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *See City of Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring).

In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *See General Bldgs. Contrs. Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws. Finally, in 1870, the Fifteenth Amendment declared that the right of citizens to vote could not be denied or abridged on "the account of race, color, or previous condition of servitude.

Thus, the Fourteenth Amendment was part of a concerted effort to eliminate the lingering vestiges of slavery. In *Loving*, the Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "[p]enalties for miscegenation arose as an incident to slavery." *Loving*, 388 U.S. at 6. Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id.*, at 10.

But while the original intendment of the Fourteenth Amendment validates its application to Virginia's miscegenation statute, appellants have produced no evidence to show the Texas Equal Rights Amendment was ever intended to decriminalize homosexual conduct. Rather, appellants contend we should blindly adhere to the bare words of the amendment, giving them absolute effect. The irony, of course, is that this is the very argument employed by those who sought to defeat the amendment almost thirty years ago. Opponents of the amendment, for example, theorized it would mandate the construction of unisex restrooms in schools and government buildings, prohibit the segregation of male and female prisoners, decriminalize homosexual conduct, and legalize same-sex marriages. Most supporters of the amendment not only rejected this construction, they ridiculed it.[2] Now, however, after time has begun to obscure the original intent of the amendment, what was considered a highly unlikely, if not farcical interpretation, has been embraced by the majority.

The Texas Constitution derives its force from the people of Texas. *See Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). Thus, the "preeminent goal of constitutional interpretation is to give effect to the intent of

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[2] A full decade after the amendment was adopted, one writer humorously observed: Despite predictions to the contrary, the sex equality provision of the Texas Equal Rights Amendment (Texas ERA) has not established unisex bathrooms, has not approved marriage between persons of the same sex, has not invalidated sex offenses, has not relieved husbands and fathers of support obligations to their wives and children, has not forced homemakers into the labor force, has not rendered Texans sexless, and has not destroyed the social fabric of the state. The Alamo still stands in San Antonio. Rodric B. Schoen, *The Texas Equal Rights Amendment After the First Decade: Judicial Developments 1978-1982*, 20 HOUS. L. REV. 1321 (1982).

the people who adopted the constitution." *In the Interest of J.W.T.*, 872 S.W.2d 189, 205 (Tex. 1994).[3] In determining the meaning, intent and purpose of a constitutional provision, "the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of inquiry. *Markowsky v. Newman*, 136 S.W.2d 808, 813 (Tex.1940). I believe the history and manifest purpose of the Texas Equal Rights Amendment compel a different result.

After a lengthy struggle for suffrage, women obtained the right to vote in 1920 with the ratification of the Nineteenth Amendment to the federal constitution.[4] Although this was an important milestone, women still did not enjoy all the legal rights afforded to men. Building upon their success, women sought to rectify these inequities as early as 1923 by way of an "equal rights amendment" to the federal constitution.[5] Although initial efforts were unsuccessful, Congress finally

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[3] "[T]he intention of the framers of a constitution is of but little importance–the real question being, what did the people intend by adopting [the constitutional] language submitted to them?" *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993) (quoting *Smissen v. State*, 71 Tex. 222, 9 S.W. 112, 116 (1888).

[4] The amendment provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.
>
> Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIX.

[5] Barbara Karkabi, *Equal Rights Amendment backers renew efforts*, HOUS. CHRON., Feb. 22, 1989, Houston Section, at 1.

proposed such an amendment on March 22, 1972.[6] Needing the approval of 38 states for ratification, the passage of the federal equal rights amendment was, from the outset, uncertain. Undaunted, and proceeding simultaneously on "two fronts," efforts were made to add similar amendments to the state constitutions.

In Texas, the 62nd Legislature proposed, by joint resolution, an equal rights amendment to the Texas Constitution and ordered that the proposition be placed on the ballot.[7] Although inclusion of the terms "race, color, creed, or national origin," in addition to "sex" made the proposed amendment broader than its federal counterpart, its fundamental purpose was identical to the federal equal rights amendment.[8] Stated simply, the goal of the federal equal rights amendment was to guarantee that "[m]en and women shall have equal rights under

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[6] The proposed amendment stated:

> 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

John J. Sampson, *The Texas Equal Rights Amendment and the Family Code: Litigation Ahead*, 5 TEX. TECH L. REV. 631, 632 n.5 (1974).

[7] The ballot proposal stated:

> The constitutional amendment to provide that equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

Tex. S.J. Res. 16, 62nd Leg., R.S., 1971 Tex. Gen. Laws 4129.

[8] Sampson, at 633.

the law in the United States."[9] Thus, shortly before the election, the Houston Post referred to the Texas proposition as "the so-called women's rights amendment," and said the "amendment is designed to supplement the federal guarantees of equal treatment in the 14th Amendment and the Civil Rights Act."[10] The Dallas Morning News reported that the stated aim of both the state and federal equal rights amendments was "to prove that it is legitimate for women to try to do whatever they want" and put a stop to "men who have tried to keep women down."[11] Thus, when on November 7, 1972, the people of this state overwhelmingly approved the Texas Equal Rights Amendment, it was with the intent of promoting *equality* under the law as between men and women.

Although appellants have attempted to frame their challenge to Section 21.06 of the Penal Code in terms of gender discrimination, their true ground for complaint is that the statute criminalizes certain homosexual conduct that, in a heterosexual setting, would be perfectly legal. However, homosexual conduct is not a constitutionally protected liberty interest, nor do homosexuals constitute a suspect or quasi-suspect class. *See Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985). More importantly, the 6 history of the Texas Equal Rights Amendment suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct.

Accordingly, I believe the State's argument has merit;

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[9] Karkabi, at 1.

[10] *Post/Commentary*, HOUS. POST, Nov. 4, 1972, at 6/B.

[11] Kay Crosby Ellis, *Stamp of legitimacy for women necessary*, DALLAS MORNING NEWS, Nov. 4, 1972, at 4/C.

the so-called sodomy statute does not violate the Texas Equal Rights Amendment because it does not discriminate on account of gender. Moreover, the State's position cannot be rejected simply because a similar argument was, in a different context, rejected in by the Supreme Court in *Loving v. Virginia*. In fact, long after the decision in *Loving*, the Texas Court of Criminal Appeals adopted the same argument advanced here. *See Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985).

In *Boutwell*, the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code. Until its repeal in 1983, the statute provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. The statute provided:

> A person commits an offense if, with the intent to arouse or gratify the sexual desire of any person, he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and the child is younger than 17 years.
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> It is a defense to prosecution under this section that *the child was of the opposite sex*, was at the time of the alleged offense 14 years or older, and had, prior to the alleged offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.
>
> It is an affirmative defense to prosecution under this section that *the actor was of the opposite sex* and was not more than two years older than the victim.

Act of May 24, 1973, 63 rd Leg., R.S., ch. 399, § 21.10, 1973 Tex. Gen. Laws 918. (Emphasis added). When Lester Boutwell

was charged with sexual abuse of several boys, he argued the above statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *See Boutwell*, 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

> But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" *act* is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b).

Id. at 169; *see also Boulding v. State*, 719 S.W.2d 333 (Tex. Crim. App. 1986). [12]

In a slightly different context, appellants' argument has also been rejected by the Washington Court of Appeals. *See Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974, pet. denied). When two men were denied a marriage license in the State of Washington, they challenged the constitutionality of the prohibition on the basis that such prohibition violated the Washington Equal Rights Amendment. *Id.* Like the Texas

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[12] *Boutwell* has been severely criticized, but on different grounds than those at issue here. *See McGlothlin v. State*, 848 S.W.2d 139, 138 (Tex. Crim. App. 1992); *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

Constitution, the Washington amendment provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." *Id.* at 1190.[13]

The Washington court rejected the contention on the theory that the approval of the ERA by the people of Washington did not reflect any intention on their part to offer homosexual couples the protection of marriage laws. *Id.* at 1193-94. Rather, the court held that "the purpose of the ERA is to provide the legal protection, as between men and women, that apparently is missing from the state and federal Bills of Rights, and it is in light of that purpose that the language of the ERA must be construed." *Id.* at 1194. Holding that the primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women on account of sex, the court wrote:

> To accept the appellants' contention that the ERA must be interpreted to prohibit statutes which refuse to permit same-sex marriages would be to subvert the purpose for which the ERA was enacted by expanding its scope beyond that which was undoubtedly intended by the majority of the citizens of this state who voted for the amendment.

Id.

I have no quarrel with the majority's conclusion that gender is a "suspect classification" under the Texas Equal Rights Amendment. *See Barber v. Colorado I.S.D.*, 901 S.W.2d

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[13] The same argument advanced by appellants applies equally well against this state's prohibition of same-sex marriages. *See* TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

447, 452 (Tex. 1995). However, I do not believe Section 21.06 of the Penal Code discriminates on the basis of gender, but only on the basis of sex acts that the people of this state did not intend to include within the ambit of the amendment. To the extent the statute discriminates against homosexuals, the statute is valid if the State can show it is rationally related to any legitimate state interest.

One fundamental purpose of government is "to conserve the moral forces of society." *See Grigsby v. State*, 105 Tex. 597, 153 S.W. 1124, 1129 (Tex. 1913). Thus, the state is charged with the responsibility of protecting virtue and restraining evil. While the morality of homosexual conduct is much debated, the Legislature has considered the issue and deemed the conduct iniquitous. This determination rests with the Legislature alone—the courts may intervene only if the decision is clearly arbitrary or unreasonable. Here, the Legislature's decision, far from being arbitrary, is bolstered by considerable historical precedent.

In his sixteenth-century magnum opus on the essence of law, Montesquieu observes that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[14] Certainly, sodomy is severely denounced in the orthodox doctrines of both Judaism and Christianity.[15] Likewise, governments have long attempted to repress homosexual behavior. Under Roman law, Justinian states that

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[14] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[15] After condemning incest and adultery, the Book of Leviticus states: "Do not lie with a man as one lies with a woman; that is detestable." *Leviticus* 18:22 (New International). Similar condemnations are found in the New Testament, as well. *See* 1 *Corinthians* 6:10.

the lex Iulia imposed severe criminal penalties against "those who indulge in criminal intercourse with those of their own sex."[16] Blackstone states that the "infamous crime against nature, committed either with man or beast" was a grave offense among the ancient Goths and that it continued to be so under English common law at the time of his writing.[17]

In America, homosexual conduct was classified as a felony offense from the time of early colonization.[18] Further, in Texas, homosexual conduct has been a criminal offense for well over a century.[19] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *See Bowers v. Hardwick*, 478 U.S. 186, 193 (1986).

Historical abhorrence of homosexual conduct is not, of course, necessarily derived from, nor does it constitute proof of, the moral or immoral character of the activity. If good and evil are to be anything other than relative, highly mutable concepts, they must rest upon divinely instituted principles. Thus, secular laws based upon moral rectitude can rarely, if ever, be justified by physical proofs which no one can dispute; what some hold

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[16] *See* FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5 th ed., Oxford 1913).

[17] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16.

[18] *See* LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[19] *See* Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art.507 (1911); and Tex. Penal Code art. 524 (1925).

as moral insight will always be dismissed by others as mere prejudice. Nevertheless, most, if not all, of our law is "based on notions of morality." *See Bowers*, 478 U.S. at 196. The legislature has outlawed behavior ranging from murder to prostitution precisely because it deemed these activities to be moral transgressions. Even our civil law is based on concepts of fairness derived from a moral understanding of right and wrong. While it is by no means infallible in its ethical judgments, the Legislature is charged with the responsibility of preserving the morals of a civil society. Thus, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. *See Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928).

The modern trend in the law has been to decriminalize all forms of consensual sexual conduct even though such behavior may be widely and justifiably perceived as immoral. Whether this trend will ultimately encompass homosexual conduct remains to be seen. Like former criminal prohibitions against adultery and fornication, the Legislature may ultimately choose to repeal the criminal sanctions now imposed against homosexual conduct. On the other hand, to preserve fundamental morals, the Legislature may choose to not only retain the sanctions against homosexual conduct, but also reinstate penalties for other forms of consensual sexual conduct that are currently permissible under the law. In other words, such decisions are the prerogative of the Legislature alone—they should not be imposed by judicial fiat. As a court, we must presume the legislature has correctly assessed the moral repugnance of activities it has chosen to penalize with criminal sanctions. Accordingly, we must assume for the purposes of our analysis that homosexual conduct is morally reprehensible.

I believe the State of Texas has demonstrated it has a legitimate state interest in criminalizing homosexual conduct because (1) it is charged with the responsibility of preserving the public morals, and (2) homosexual conduct represents a gross deviation from historical perceptions of morality. Therefore, I must respectfully dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed June 8, 2000.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Publish — TEX. R. APP. P. 47.3(b).

Appendix E

JUDGMENT ON PLEA OF GUILTY/NOLO CONTENDERE/GUILTY
BEFORE COURT—WAIVER OF JURY TRIAL

CAUSE NO. 9848530

THE STATE OF TEXAS
vs.
John Geddes Lawrence
(Name of Defendant)
AKA

IN THE ____ DISTRICT COURT
COUNTY CRIMINAL COURT AT LAW NO. 10
OF HARRIS COUNTY, TEXAS

Judge Presiding: D Rose
Attorney for State: R Segura
Attorney for Defendant: E M. Katine
☐ Defendant Waived Counsel
Offense Convicted of: Homosexual Conduct
Date of Judgment: DEC 22 1998
Date Sentence Imposed: DEC 22 1998
Sentence to Begin Date: DEC 22 1998
Date of Offense: 9-17-98

☒ A MISDEMEANOR, CLASS: A | B | C ☐ A FELONY, DEGREE: SJ | 3rd | 2nd | 1st | CAPITAL
Statute Number of Plea Statute (In Detail): $200.00 fine

(Circle appropriate selection — N/A = not available or not applicable)

Plea to Enhancement Paragraph(s): 1st Paragraph True | Not True | N/A; 2nd Paragraph True | Not True | N/A
Charging Instrument: Complaint | Indictment | Information
Findings on Enhancement(s): 1st Paragraph True | Not True | N/A; 2nd Paragraph True | Not True | N/A
Plea: Guilty | Nolo Contendere | Not Guilty
Affirmative Findings: Deadly Weapon: Yes | No | N/A; Family Violence: Yes | No | N/A; Hate Crime: Yes | No | N/A

Punishment Imposed and Place of Confinement: (Mark all that apply)
☐ Institutional Division, TDCJ
☐ State Jail Division, TDCJ
☐ Harris County Jail
☐ Sentence suspended, Defendant placed on community supervision for ____
☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

☒ Fine in the Amount of $ 200.00
☒ Fine Only

Time Credited: ____ days toward Incarceration ____ days toward fine and costs ____ days toward incarceration, fine and costs
COURT COSTS: $ 141.35

(Mark appropriate selections below, if applicable)
☐ Venue changed from ____
☐ Judgment Addendum incorporated herein by reference.
☐ Driver's license is suspended for a period of ____ days/months/years.

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic reproduction and for digitization.

V2594 P0332

☐ The Defendant is entitled to _____ days credit toward suspension of driver's license.

☐ It is ordered by the Court, that any weapon(s) seized in this case before hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13 (h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

This cause being called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above, and both parties announced ready for trial. The Defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea; the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted, found the Defendant guilty of the offense indicated above. The Defendant was granted the right of allocution and entered nothing in bar thereof. The Court proceeded to the presence of the Defendant to pronounce sentence against the Defendant.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of this prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is committed to the custody of the Sheriff of Harris County, Texas, unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail for the period indicated above, and until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause, unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on DEC 22 1998

Community Supervision Expires on: _____

X _____ PRESIDING JUDGE

Notice of Appeal: DEC 22 1998

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on _____ at _____ AM | PM.
Sheriff, Harris County, Texas

By: _____ Deputy

SPECIAL INSTRUCTION OR NOTES: _____

Received 23 Dec 98
Verified
LCBT
LCBV

Right Thumbprint

V2504 P0333

JUDGMENT ON PLEA OF GUILTY/PLEA OF CONTENDERE/FINDING OF GUILTY
BEFORE COURT—WAIVER OF JURY TRIAL

CAUSE NO. 984853 1

THE STATE OF TEXAS
VS.
Tyson Hansen
(Name of Defendant)

IN THE _____ DISTRICT COURT

COUNTY CRIMINAL COURT AT LAW NO. 10

OF HARRIS COUNTY, TEXAS

AKA _____

Judge Presiding: D Bass
Attorney for State: A Briones
Attorney for Defendant: M. Katine ☐ Defendant Waived Counsel
Offense Committed on: Harassment Conduct

Date of Judgment: DEC 22 1998
Date Sentence Imposed: DEC 22 1998
Sentence to Begin Date: DEC 22 1998
Date of Offense: 9-17-98

X A MISDEMEANOR, CLASS A | B | C ☐ A FELONY, DEGREE SJ | 3rd | 2nd | 1st | CAPITAL

Class of Plea Bargain (In Detail): $200.00 fine

(Circle appropriate selection -- N/A = not available or not applicable)

Plea to Enhancement Paragraph(s): 1st Paragraph True | Not True | N/A; 2nd Paragraph True | Not True | N/A

Charging Instrument: Complaint | Indictment | Information

Findings on Enhancement(s): 1st Paragraph True | Not True | N/A; 2nd Paragraph True | Not True | N/A

Plea: Guilty | Nolo Contendere | Not Guilty

Affirmative Findings: Deadly Weapon: Yes | No | N/A; Family Violence: Yes | No | N/A; Hate Crime: Yes | No | N/A

Punishment Imposed and Place of Confinement: (Mark all that apply)
☐ Institutional Division, TDCJ
☐ State Jail Division, TDCJ
☐ Harris County Jail
☐ Sentence suspended, Defendant placed on community supervision for _____
☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

X Fine in the Amount of $ 200.00
X Fine Only

Time Credited: _____ days toward incarceration _____ days toward fine and costs _____ days toward incarceration, fine and costs

COURT COSTS: $ 141.25

(Mark appropriate instructions below, if applicable)
☐ Name changed from _____
☐ Judgment Addendum incorporated herein by reference.
☐ Driver's license is suspended for a period of _____ days/years (circle one).

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation, and/or other reproduction was present at the time of filing.

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TDCD 807/33/98 1

V2504 P0296

☐ The Defendant is entitled to _____ days credit toward suspension of driver's license.

☐ It is ordered by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13 (b), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

This cause being called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above, and both parties announced ready for trial. The Defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea; the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted, found the Defendant guilty of the offense indicated above. The Defendant was granted the right of allocution and exercised nothing in her thereof. The Court pronounced in the presence of the Defendant as punishment assessed against the Defendant.

IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of this prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas, unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail for the period indicated above, and until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause, unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, or be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended and if so, the Defendant is placed on community supervision for the period indicated above providing he abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment and Sentence that the sentence is to run consecutively.

DEC 22 1998

Signed and entered on _____

Community Supervision
Expires on: _____

X _____
JUDGE PRESIDING JUDGE

Notice of Appeal: DEC 22 1998

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on _____ at _____ AM | PM.
Sheriff, Harris County, Texas

By: _____ Deputy

SPECIAL INSTRUCTION OR NOTES: _____

Entered 12/22/1998
Verified
LCBT
LCSU

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V2501 P0297

Appendix F

HEARING TRANSCRIPT
MOTION TO QUASH THE COMPLAINTS
DECEMBER 22, 1998

IN THE COUNTY CRIMINAL COURT
AT LAW NO. 10
HARRIS COUNTY, TX
Hon. Sherman A. Ross

THE STATE OF TEXAS
vs.
JOHN GEDDES LAWRENCE
CAUSE NO. 9848530

THE STATE OF TEXAS
vs.
TYRON GARNER
CAUSE NO. 9848531

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

The Court: This is cause number 9848530 and 9848531. The State versus John Geddes Lawrence and Tyrone Garner. The Court has before it a motion, I believe, a Motion to Quash.

Mr. Katine: Mr. Lawrence is present, Judge, with Counsel and Mr. Garner is present. Your Honor, the first motion we have on behalf of Tyrone Garner and John Geddes Lawrence, is a Motion to Participate of Suzanne Goldberg. We'd like to move that she be permitted to participate as the Counsel on behalf of the Defendants along with David Jones and Mitchell Katine.

The Court: That'll be granted.

Ms. Goldberg: Your Honor, we would like to offer the Exhibits, the . . .

Ms. Beaver: Judge, I believe there is a Motion to Quash in front of you. It was filed on December 16th, 1998. The State at this time will waive any kind of time requirements for notice. We've had plenty of time to look at the Motion and we're prepared to proceed today.

The Court: All right, I've made a docket notation and the Court finds that there is good cause to proceed today.

Ms. Goldberg: Thank you, Your Honor. Defendants Garner and Lawrence would now like to offer into evidence the Probable Cause Affidavit and the Complaint charging both of them, each of them, with violation of Penal Code 2106, the Homosexual Conduct Statute. The Probable Cause Affidavit charging John Geddes Lawrence, Defendant's Exhibit One in

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

his case and the Complaint is Defendant's Exhibit Two for Lawrence.

The Court: Any objections?

Ms. Beaver: The State has no objections to Defendant's Exhibits One and Two in each cause number.

The Court: All right, they'll be admitted.

Ms. Goldberg: And likewise, the Probable Cause Affidavit for Garner is Defendant's Exhibit One and the Complaint is Defendant's Exhibit Two.

The Court: All right. That's also admitted.

Ms. Goldberg: Your Honor, you have before you our Motions to Quash the charges against both Defendants on constitutional grounds and we have agreed, together with the Prosecution, to waive arguments.

The Court: All right. The Court has reviewed the Motions and considered same and respectfully denies them.

Mr. Katine: I think there are Orders in both eases.

The Court: All right.

Ms. Goldberg: Your Honor, our clients have reached an agreement with the Prosecutor and are prepared to enter a plea at this time.

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

The Court: I understand that there is a plea bargain as to the client's plea at this time?

Ms. Beaver: There is, Your Honor.

The Court: All right. Let me ask them individually what their pleas are. Mr. Garner.

Mr. Garner: Yes, sir.

The Court: How do you plead, sir?

Mr. Garner: No Contest.

The Court: Mr. Lawrence?

Mr. Lawrence: No Contest.

The Court: All right. I need to hear some prima facia facts. Very briefly.

Ms. Beaver: If I may have the exhibits.

The Court: Can we have an agreement that the facts for one would be the facts for both.

Ms. Goldberg: Yes, Your Honor.

The Court: All right.

Ms. Beaver: Your Honor, officers were dispatched to 794 Normandy, # 833, in reference to a weapons disturbance. The

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

reportee had advised dispatch that a black male was going crazy in the apartment and was armed with a gun. Officers met with the reportee who directed the officers to the upstairs apartment. On entering the apartment and conducting a search for the armed suspect, officers observed the Defendants engaged in deviate sexual conduct, namely, oral sex. I'm sorry, anal sex. Both Defendants were engaged in deviate sexual conduct.

The Court: All right. I find you Guilty. What type of agreement have you reached in punishment?

Ms. State: On each case, Your Honor, we've reached an agreement for a $200.00 fine.

The Court: Is that your understanding, Mr. Jones ?

Mr. Jones: Yes, it is.

The Court: Okay. Ms. Goldberg?

Ms. Goldberg: Yes, it is, Your Honor.

The Court: Mr. Katine?

Mr. Katine: Yes, it is.

Ms. Goldberg: Just one more matter, Your Honor, which is that we would move to allow the original bond to remain in effect for both Defendants as their appeal bonds.

The Court: All right. That will be a house keeping matter that we'll take up with the clerk. We also will need written

Transcript of Hearing on Motion to Quash (Dec. 22, 1998)

notice on this.

Mr. Katine: I have it prepared, Your Honor.

The Court: Do you? All right. Okay. I'm ready sentence both the Defendants. Mr. Garner, having been found Guilty of the offense of Homosexual Conduct, the Court assesses your punishment at $200.00.

Mr. Lawrence, having been found Guilty of the offense of Homosexual Conduct, the Court assesses your punishment at $200.00. All right. This hearing is concluded.

Appendix G

CAUSE NO. 98-48530

THE STATE OF TEXAS	§	IN THE COUNTY
	§	CRIMINAL COURT
	§	
VS.	§	AT LAW NUMBER FIVE (5)
	§	
JOHN GEDDES	§	
LAWRENCE	§	HARRIS COUNTY, TEXAS

DEFENDANT'S MOTION TO QUASH COMPLAINT/INFORMATION UNDER TEXAS PENAL CODE §21.06

TO THE HONORABLE JUDGE OF THE COUNTY CRIMINAL COURT:

NOW COMES John Geddes Lawrence, defendant in the above-referenced cause, by and through his attorney of record, and files this motion to set aside and quash the complaint/information against him based on Texas Penal Code §21.06. As he argues below, the statute is unconstitutional on its face and as applied to him. First, it violates Mr. Lawrence's right to equal protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under the Equal Rights Amendment of Article 1, Section 3a and the equal rights provision of Article 1, Section 3 of the Texas Constitution. Second, §21.06 violates Mr. Lawrence's right to privacy guaranteed by the Bill of Rights and Fourteenth Amendment of the United States Constitution and by the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution. For the following reasons, the

complaint/information against Mr. Lawrence should be quashed:

1. Defendant Lawrence was arrested and charged with violating Texas Penal Code §21.06, entitled the "Homosexual Conduct" statute.
2. Texas Penal Code §21.06, a class C misdemeanor, provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
3. Texas Penal Code §21.01 defines "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."
4. Thus, neither use of force nor occurrence in a public place is an element of the "Homosexual Conduct" crime.
5. The complaint/information states that Mr. Lawrence "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The complaint/information is attached hereto at Tab A.
6. The police report that forms the basis of the §21.06 charge states that Mr. Lawrence engaged in sexual relations with another man inside that man's home. Consistent with the elements of the crime under §21.06, the report contains no allegations of force or monetary exchange between Mr. Lawrence and the other man. The police report is attached hereto at Tab B.
7. The criminal charges against Mr. Lawrence under §21.06 rests solely on consensual, adult, private sexual relations with another person of the same sex.

Equal Protection and Equal Rights Amendment Violations

8. The "Homosexual Conduct" statute, Tex. Penal Code §21.06, classifies and criminalizes consensual sexual acts, including those in private, according to the sex and sexual orientation of those who engage in them.

United States Constitutional Claim

9. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without an important or exceedingly persuasive purpose that is substantially or closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
10. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a legitimate or more substantial purpose that is rationally or more closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
11. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court explained that governmental discrimination based on sex is impermissible unless the classification is "'substantially related'" to achieving an "exceedingly persuasive" justification. *Id.* at 533 (citation omitted). Here, no such justification exists for a law that criminalizes acts according to the sex of those who engage in them.
12. The United States Supreme Court emphasized in *Romer v. Evans*, 517 U.S. 620 (1996), that the Constitution "'neither

knows nor tolerates classes among citizens.'" *Id.* at 623 (citation omitted). Section 21.06, like the amendment singling out and disadvantaging lesbians, gay men, and bisexuals that was invalidated in *Romer*, lacks a legitimate purpose, much less a more substantial state interest, for its discriminatory classification against gay people.

Texas Constitutional Claims

13. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without the classification being narrowly tailored to serve a compelling government interest, Texas Penal Code §21.06 violates Article 1, Section 3a of the Texas Constitution, known as the Equal Rights Amendment, as well as Article 1, Section 3 of the Texas Constitution.
14. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a constitutionally sufficient justification for that classification, Texas Penal Code §21.06 violates Article 1, Sections 3 and 3a of the Texas Constitution.
15. As the Texas Supreme Court explained in *In re McLean*, 725 S.W.2d 696 (1987), the state can justify a sex-based classification under the Equal Rights Amendment to the Texas Constitution "only when . . . there is no other manner to protect" a compelling state interest. Id. at 698. No such need can be shown here.
16. Likewise, in *State v. Morales*, 826 S.W.2d 201, 204 (Tex. App.-Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Texas 1994), the court observed that "the State cannot make the same conduct criminal when done by one, and innocent when done by the other." No legitimate, much less more substantial state purpose, justifies the

"Homosexual Conduct" law's punishment directed uniquely at gay Texans, such as Mr. Lawrence.

Right to Privacy Violations

17. The right to privacy guarantees individuals protection from state interference in personal, important decisions about their most intimate relationships and the ways in which they choose to express themselves through consensual sexuality. The freedom to make such decisions without state interference is particularly strong in one's own home and in other similarly private settings.

United States Constitutional Claims

18. Because it intrudes upon and imposes criminal sanctions on the private expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Lawrence's right to privacy under the Bill of Rights (including the First, Fourth, Fifth and Ninth Amendments) and the Fourteenth Amendment of the United States Constitution.
19. The United States Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld Georgia's sodomy statute against a privacy challenge, has been widely criticized by scholars and was wrongly decided. *See, e.g.*, Laurence H. Tribe, American Constitutional Law, 1422-1435 (2d ed. 1988). Indeed, the U.S. Supreme Court's "cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of*

Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986). And as noted below, the statute at issue in *Hardwick* has been struck down by the Georgia Supreme Court. When properly construed, the U.S. Constitution's right to privacy protects the right of individuals, including Mr. Lawrence, to make deeply personal decisions about private sexual intimacy; §21.06 infringes that protection.

Texas Constitutional Claims

20. Because it intrudes upon and imposes criminal sanctions on the private consensual expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Lawrence's right to privacy under the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution.
21. As the Texas Court of Appeals explained in *State v. Morales*, 826 S.W.2d at 204, "we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." *See also Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (recognizing right to privacy under Texas Constitution); *cf. Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (Texas Constitution can provide greater rights than U.S. Constitution). The *Morales* court then held that no compelling government interest justified that infringement of privacy rights. Similarly, the right to privacy here invalidates §21.06.

* * *

22. Appellate courts in other states have invalidated statutes similar to §21.06 as violating their state constitution's

privacy and equal protection guarantees. In *Gryczan v. State*, 942 P.2d 112 (1997), the Montana Supreme Court struck down that state's statute criminalizing same-sex sexual relations, stating that "[t]he right of consenting adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy." *Id.* at 125. *See also Powell v. State*, ___ S.W.2d ___, WL 804569 (Ga. Nov. 23, 1998) (holding Georgia's law invalid under state constitution's privacy guarantee); *Campbell v. Sundquist*, 926 S.W.2d 250, 162 (Tenn. Ct. App. 1996)(invalidating Tennessee's "Homosexual Conduct" law on privacy grounds). In *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993), the Kentucky Supreme Court struck down that state's law criminalizing same-sex sexual relations as violating the state constitution's equal protection and privacy guarantees.

23. Mr. Lawrence is prepared to offer further briefing on all of the above points, should that be of assistance to the Court.

WHEREFORE, PREMISES CONSIDERED, defendant prays that after notice and hearing, and consideration of his Motion to Quash, it be determined that Texas Penal Code

§21.06 is unconstitutional on its face and as applied to him and that his Motion to set aside the complaint/information be granted.

RESPECTFULLY SUBMITTED,

WILLIAMS, BIRNBERG &
ANDERSEN, L.L.P.

By: /s/ Mitchell Katine
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State Bar No. 11106600
6671 Southwest Freeway
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Fax: (713) 981-8670

By: /s/ Susanne B. Goldberg
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AND EDUCATION FUND,
INC.
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Telecopier: (212) 809-0055
(Motion to Participate in
Proceedings pending)

OF COUNSEL:
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Telecopier: (713) 981-8670
Telecopier: (713) 981-8670

TAB A

CASE NO. [illegible]

IN THE JUSTICE COURT OF
HARRIS COUNTY, TEXAS
PRECINCT 3, POSITION 1

[illegible]

THE STATE OF TEXAS

VS.

[illegible] DEFENDANT

[illegible]

[illegible]

OFFICER: [illegible]
AGENCY: HCSO
WK PHONE: [illegible]
DATE: [illegible]

Complainant information:
[illegible]

COMPLAINT
IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

000033

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned Affiant, who, after being duly sworn, on oath deposes and says that he has reason to believe and does believe that John Geddes Lawrence on or about the [illegible] day of September, 19[illegible], and before the filing of this complaint, in the County of Harris, and the State of Texas, in Justice Precinct 3, Position 1, did then and there intentionally and knowingly engage in deviate sexual intercourse, to wit: [illegible] penetrate the anus of another person of the same sex (male), with [illegible]

Contrary to law and against the peace and dignity of the State.

[illegible]
AFFIANT

SWORN to and subscribed before me on [illegible]

[illegible]
Notary Public, the State of Texas
Clerk of Court, Harris County

TAB B

Probable Cause Affidavit — Class "C" Instanter Charges

Lawrence John Geddes

W/M 5-2-48 5'11" 150 Brn

S Y

714 Normandy #533

Houston Tx 77015 713-450-3609

999689

9-17-98 Quuan J 1999

HCSO 455-5050 714 Normandy #533 Homosexual Conduct

Officers dispatched to 714 Normandy #533 reference to a weapons disturbance. The reporter advised daughter a black male was going crazy in the apartment and he was armed with a gun.

Officers met the reporter who directed officers to the victims apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another male.

Witness: W.D. Jolly
Home Unit #1911
9669 Wallisville
Houston, Tx 77029 713-455-8250

714 Normandy #533

12 Cost

CAUSE NO. 98-48531

THE STATE OF TEXAS	§	IN THE COUNTY
	§	CRIMINAL COURT
	§	
VS.	§	AT LAW NUMBER FIVE (5)
	§	
TYRONE GARNER	§	HARRIS COUNTY, TEXAS

DEFENDANT'S MOTION TO QUASH COMPLAINT/INFORMATION UNDER TEXAS PENAL CODE §21.06

TO THE HONORABLE JUDGE OF THE COUNTY CRIMINAL COURT:

NOW COMES Tyrone Garner, defendant in the above-referenced cause, by and through his attorney of record, and files this motion to set aside and quash the complaint/information against him based on Texas Penal Code §21.06. As he argues below, the statute is unconstitutional on its face and as applied to him. First, it violates Mr. Garner's right to equal protection under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and under the Equal Rights Amendment of Article 1, Section 3a and the equal rights provision of Article 1, Section 3 of the Texas Constitution. Second, §21.06 violates Mr. Garner's right to privacy guaranteed by the Bill of Rights and Fourteenth Amendment of the United States Constitution and by the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution. For the following reasons, the complaint/information against Mr. Garner should be quashed:

1. Defendant Garner was arrested and charged with violating Texas Penal Code §21.06, entitled the "Homosexual Conduct" statute.
2. Texas Penal Code §21.06, a class C misdemeanor, provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
3. Texas Penal Code §21.01 defines "deviate sexual intercourse" as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."
4. Thus, neither use of force nor occurrence in a public place is an element of the "Homosexual Conduct" crime.
5. The complaint/information states that Mr. Garner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The complaint/information is attached hereto at Tab A.
6. The police report that forms the basis of the §21.06 charge states that Mr. Garner engaged in sexual relations with another man inside that man's home. Consistent with the elements of the crime under §21.06, the report contains no allegations of force or monetary exchange between Mr. Garner and the other man. The police report is attached hereto at Tab B.
7. The criminal charges against Mr. Garner under §21.06 rests solely on consensual, adult, private sexual relations with another person of the same sex.

Equal Protection and Equal Rights Amendment Violations

8. The "Homosexual Conduct" statute, Tex. Penal Code §21.06, classifies and criminalizes consensual sexual acts,

including those in private, according to the sex and sexual orientation of those who engage in them.

United States Constitutional Claim

9. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without an important or exceedingly persuasive purpose that is substantially or closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
10. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a legitimate or more substantial purpose that is rationally or more closely related to that classification, Texas Penal Code §21.06 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
11. In *United States v. Virginia*, 518 U.S. 515 (1996), the Supreme Court explained that governmental discrimination based on sex is impermissible unless the classification is "'substantially related'" to achieving an "exceedingly persuasive" justification. *Id.* at 533 (citation omitted). Here, no such justification exists for a law that criminalizes acts according to the sex of those who engage in them.
12. The United States Supreme Court emphasized in *Romer v. Evans*, 517 U.S. 620 (1996), that the Constitution "'neither knows nor tolerates classes among citizens.'" *Id.* at 623 (citation omitted). Section 21.06, like the amendment singling out and disadvantaging lesbians, gay men, and bisexuals that was invalidated in *Romer*, lacks a legitimate

purpose, much less a more substantial state interest, for its discriminatory classification against gay people.

Texas Constitutional Claims

13. Because it determines criminality of acts based on the sex of the individuals engaged in the specified acts without the classification being narrowly tailored to serve a compelling government interest, Texas Penal Code §21.06 violates Article 1, Section 3a of the Texas Constitution, known as the Equal Rights Amendment, as well as Article 1, Section 3 of the Texas Constitution.
14. Because it determines criminality of acts based on the sexual orientation of the individuals engaged in the specified acts without a constitutionally sufficient justification for that classification, Texas Penal Code §21.06 violates Article 1, Sections 3 and 3a of the Texas Constitution.
15. As the Texas Supreme Court explained in *In re McLean*, 725 S.W.2d 696 (1987), the state can justify a sex-based classification under the Equal Rights Amendment to the Texas Constitution "only when . . . there is no other manner to protect" a compelling state interest. Id. at 698. No such need can be shown here.
16. Likewise, in *State v. Morales*, 826 S.W.2d 201, 204 (Tex. App.-Austin 1992), *rev'd on other grounds*, 869 S.W.2d 941 (Texas 1994), the court observed that "the State cannot make the same conduct criminal when done by one, and innocent when done by the other." No legitimate, much less more substantial state purpose, justifies the "Homosexual Conduct" law's punishment directed uniquely at gay Texans, such as Mr. Garner.

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17. The right to privacy guarantees individuals protection from state interference in personal, important decisions about their most intimate relationships and the ways in which they choose to express themselves through consensual sexuality. The freedom to make such decisions without state interference is particularly strong in one's own home and in other similarly private settings.

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18. Because it intrudes upon and imposes criminal sanctions on the private expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Garner's right to privacy under the Bill of Rights (including the First, Fourth, Fifth and Ninth Amendments) and the Fourteenth Amendment of the United States Constitution.
19. The United States Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld Georgia's sodomy statute against a privacy challenge, has been widely criticized by scholars and was wrongly decided. *See, e.g.*, Laurence H. Tribe, American Constitutional Law, 1422-1435 (2d ed. 1988). Indeed, the U.S. Supreme Court's "cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). And as noted below, the statute at issue in *Hardwick* has been struck down by the Georgia Supreme Court. When properly construed, the U.S. Constitution's right to privacy

protects the right of individuals, including Mr. Garner, to make deeply personal decisions about private sexual intimacy; §21.06 infringes that protection.

Texas Constitutional Claims

20. Because it intrudes upon and imposes criminal sanctions on the private consensual expressions of sexual intimacy between certain consenting adults and is not narrowly tailored to achieve any compelling government interest, Texas Penal Code §21.06 violates Mr. Garner's right to privacy under the Bill of Rights (including Article 1, Sections 9 and 19) of the Texas Constitution.
21. As the Texas Court of Appeals explained in *State v. Morales*, 826 S.W.2d at 204, "we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." *See also Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (recognizing right to privacy under Texas Constitution); *cf. Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (Texas Constitution can provide greater rights than U.S. Constitution). The *Morales* court then held that no compelling government interest justified that infringement of privacy rights. Similarly, the right to privacy here invalidates §21.06.

* * *

22. Appellate courts in other states have invalidated statutes similar to §21.06 as violating their state constitution's privacy and equal protection guarantees. In *Gryczan v. State*, 942 P.2d 112 (1997), the Montana Supreme Court struck down that state's statute criminalizing same-sex sexual relations, stating that "[t]he right of consenting

adults, regardless of gender, to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy." *Id.* at 125. *See also Powell v. State*, ___ S.W.2d ___, WL 804569 (Ga. Nov. 23, 1998) (holding Georgia's law invalid under state constitution's privacy guarantee); *Campbell v. Sundquist*, 926 S.W.2d 250, 162 (Tenn. Ct. App. 1996)(invalidating Tennessee's "Homosexual Conduct" law on privacy grounds). In *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993), the Kentucky Supreme Court struck down that state's law criminalizing same-sex sexual relations as violating the state constitution's equal protection and privacy guarantees.

23. Mr. Garner is prepared to offer further briefing on all of the above points, should that be of assistance to the Court.

WHEREFORE, PREMISES CONSIDERED, defendant prays that after notice and hearing, and consideration of his Motion to Quash, it be determined that Texas Penal Code §21.06 is unconstitutional on its face and as applied to him and that his Motion to set aside the complaint/information be granted.

RESPECTFULLY SUBMITTED,

WILLIAMS, BIRNBERG &
ANDERSEN, L.L.P.

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Proceedings pending)

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TAB A

CASE NO. CR1C1892003

IN THE JUSTICE COURT OF
HARRIS COUNTY, TEXAS
PRECINCT 3, POSITION 1

6097397

THE STATE OF TEXAS

VS.

[illegible] DEFENDANT

OFFICER: J. QUINN
AGENCY: HCSO
WK PHONE: 713-755-6260
DATE: 9-17-95

Complainant information:
[illegible]

COMPLAINT
IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

000032

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned Affiant, who, after being duly sworn, on oath deposes and says that he has reason to believe and does believe that

[illegible] Defendant, on or about the 17th day of September, 1995, and before the filing of this complaint, in the County of Harris, and the State of Texas, in Justice Precinct 3, Position 1, did then and there intentionally and knowingly [illegible]

Contrary to law and against the peace and dignity of the State.

J. K. Quinn #1892
AFFIANT

SWORN to and subscribed before me on 17 Sept 95

KENNETH O. ADAMS
NOTARY PUBLIC
STATE OF TEXAS
COMM. EXP. FEBRUARY 9, 1997

Notary Public, the State of Texas
Clerk of Court, Harris County

TAB B

Probable Cause Affidavit — Class "B" Instanter Charges

DEFENDANT NAME GARNER TYRON

RACE N SEX M DOB 7-10-67 HEIGHT 5'9" WGT 140 EYES BRO

MARITAL STATUS S U.S. CITIZEN Y

STREET ADDRESS OF DEFENDANT 6622 New York

CITY Houston TX ZIP 77021 PHONE NUMBER 713-738-6398

OCCUPATION Unemployed HCSO SPRS. 773955

9-17-98 DATE OF OFFENSE — QUINN, J.L. OFFICER'S NAME — 1999 BADGE NUMBER

HCSO AGENCY — 455 5050 BEAT — 714 Normandy ARREST LOCATION — homosexual Conduct CHARGE

YOUR ACCOUNT OF WHAT HAPPENED (IN REGARDS TO CLASS "C" CHARGE FILED)

Officers dispatched to 714 Normandy #933 reference to a weapons disturbance. The reporter advised dispatch a black male was going crazy in the apartment and he was armed with a gun.

Officers met the reporter who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.

Witness: W.D. Lilly
HCSO Unit 4344
11330 Wallisville
Houston, Tx 77044 713 455-5050

714 Normandy #933 — OFFICER'S SIGNATURE — 1999

SWORN TO AND SUBSCRIBED BEFORE ME ON 17 Sept 98

JUSTICE OF THE PEACE

000074